17-59

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 867.

THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFFS IN ERROR,

vs.

THE COMPAGNIE GÉNÉRALE TRANSATLANTIQUE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JUNE 29, 1882.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between The People of the State of New York, as plaintiffs, against The Compagnie Générale Transatlantique, as defendant, a manifest error hath happened, to the great damage of the said The People of the State of New York as is said, and as appears by their complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right, and according to the law and custom of the United States, ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 16th day of May, in the year of our Lord one thousand eight hundred and eighty-two and of the Independence of the United States the one hundred and sixth.

[SEAL.] JOSEPH M. DEUEL,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

Allowed:

WM. J. WALLACE.

2 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Joseph M. Deuel, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from three to seventy-four inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of The People of the State of New York, plaintiff in error, against The Compagnie Générale Transatlantique, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this thirty-first day of May, in the year of our Lord one thousand eight hundred and eighty-two and of the Independence of the United States the one hundred and sixth.

[SEAL.] JOSEPH M. DEUEL, *Clerk.*

(Indorsed:) E. & A. A. 374. Supreme Court of the United States.
4183——1

The People of the State of New York, pl'ffs in error, against The Compagnie Générale Transatlantique, defendant in error. Writ of error. Lewis Sanders, pl'ffs' att'y, 39 Nassau st., N. Y. City.

Due service of a copy within admitted. N. Y., May 16, 1882.

COUBERT BROTHERS,
Att'ys Def'ts.

U. S. circuit court, May 17, 1882. Joseph M. Deuel, clerk.

3 Circuit court of the United States, southern district of New York.

THE PEOPLE OF THE STATE OF NEW YORK
vs.
THE COMPAGNIE GÉNÉRALE TRANSATLANTIQUE.

The above-entitled cause having heretofore been duly removed into this court from the court of common pleas for the city and county of New York, upon the petition of the defendant therein, The Compagnie Générale Transatlantique, in pursuance of the provisions of section 630 of the Revised Statutes of the United States, copies of said petition and of the bond and order of removal, as in such cases made and provided, and of the pleadings and proceedings and all other papers in the cause in said court
4 of common pleas having been duly filed in the clerk's office of this court on the 13th day of October, 1881, the same being hereunto annexed—

On the 20th day of October, 1881, a demurrer interposed to the complaint was filed in said cause, the same being hereto annexed.

Afterwards, and at the October term of said court for the year 1881—present, the honorable Samuel Blatchford, circuit judge—he said cause came on to be heard upon said complaint and demurrer, and was argued by counsel.

On the 20th day of April, 1882, a decree of said court was filed and entered dismissing said complaint with costs to the defendant, The Compagnie Générale Transatlantique, to be taxed, the same being hereunto annexed.

5 *Summons.*

Court of common pleas, city and county of New York.

THE PEOPLE OF THE STATE OF NEW YORK, plaintiff,
against
THE COMPAGNIE GÉNÉRALE TRANSATLANTIQUE, defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and

in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated 12th of August, 1881.

(Signed) LEWIS SANDERS,
Plaintiff's Attorney.

Office: No. 39 Nassau st., N. Y. City.

6 (Endorsed:) Court of common pleas, city and county of N. York. The People of the State of N. York v. The Companie Générale Transatlantique. Summons. Lewis Sanders, pl'ff's att'y, 39 Nassau st., N. Y. City.

7 The court of common pleas for the city and county of New York.

THE PEOPLE OF THE STATE OF NEW YORK, plaintiffs,
against
THE COMPAGNIE GÉNÉRALE TRANSATLANTIQUE, defendant.

The plaintiffs above named, by Lewis Saunders, their attorney, complain of the defendant, and allege, upon information and belief, that:

I. The defendant is and was at the times hereinafter mentioned a corporation formed under the laws of France, and owner of the vessels named below.

II. The defendant, by vessels from a foreign port, brought to the port of New York alien passengers, for whom a tax has not heretofore been
8 paid by the vessels, on the dates from the ports and to the number stated below:

Date.	Name of vessel.	Foreign port.	Number of alien passengers.
1881, June 1	St. Laurent	Havre	471
2	Ville de Marseilles	Marseilles	235
8	Amerique	Havre	862
16	France	Havre	542
20	Picardie	Marseilles	289
22	Canada	Havre	449
29	Labrador	"	580
July 4	Caldera	Marseilles	300
6	St. Laurent	Havre	273
13	Amerique	"	400
1881, July 14	Ferd. Lesseps	"	28
21	France	"	452
27	Canada	"	307
30	Ville de Marseilles	Marseilles	67
Aug'st 3	Labrador	Havre	625
10	St. Laurent	"	334

III. That the master, owner, agent, and consignee of such vessel, each and all, failed and neglected to pay or cause to pay to be paid to the
9 chamberlain of the city of New York, within twenty-four hours after the arrival of each of said vessels at the port of New York, or at any time, the sum of one dollar for each and every of said passengers so brought as aforesaid, nor has any part thereof been paid.

IV. That there is due to the plaintiffs from the defendant, by reason of the premises, the sum of seven thousand seven hundred and sixty-seven $\frac{50}{100}$ dollars, debt and penalty, and interest thereon from the day after the entry of each vessel at the port of New York, for the tax and penalty imposed by law respectively, for which sum, with interest, the plaintiffs demand judgment with costs.

LEWIS SAUNDERS,
Plaintiffs' Attorney.

Office and post-office address, 39 Nassau st., New York City.

CITY AND COUNTY OF NEW YORK, *ss:*

10 Henry J. Jackson, being duly sworn, says that he is the secretary of the commissioners of emigration, and has charge of the sworn reports of the masters of the respective vessels mentioned in the foregoing complaint, which reports give the number of alien passengers imported by each of said vessels into the port of New York at the dates named; that the foregoing complaint is true to his own knowledge except as to those matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

(Signed) HENRY J. JACKSON.

Subscribed and sworn to before me this 24th day of August, 1881.

(Signed) McQUADE,
Notary Public, N. Y. Co.

11 (Endorsed:) The court of common pleas, city and county of New York. The people of the State of New York ag'st The Compagnie Générale Transatlantique. Copy complaint. Lewis Sanders, pl'ffs' att'y, 39 Nassau st., N. Y. City.

12 *Notice of appearance.*

Court of common pleas, city and county of New York.

THE PEOPLE OF THE STATE OF NEW YORK *against* THE COMPAGNIE GÉNÉRALE TRANSATLANTIQUE.

SIR: Please to take notice that the defendant appears in this action, and that we are retained as attorneys for it therein, and demand that a copy of all papers in this action be served on us at our office, numbers 68 & 70 William street, New York.

August 12th, 1881.

Yours,

COUDERT BROTHERS,
Attorneys for Defendant, 68 & 70 William st., N. Y.

To L. SANDERS,
Plaintiffs' Attorney, 39 Nassau st., N. Y.

13 (Endorsed:) Common pleas court. The People of the State of New York ag'st The Compagnie Générale Transatlantique. Notice of appearance for defendant. Coudert Bros., attorneys for defendant.

Due and timely service of a notice, of which the within is a copy, admitted this 13th day of August, 1881.

L. SANDERS,
Plaintiffs' Attorney.

14 At a special term of the court of common pleas in and for the city and county of New York, held at the court-house, in said city, the day of October, 1881.

Present Hon. , judge.

THE PEOPLE OF THE STATE OF NEW YORK, plaintiffs,
against
THE COMPAGNIE GÉNÉRALE TRANSATLANTIQUE, defendants.

Upon reading and filing the petition of the above-named Compagnie Générale Transatlantique, the defendant herein, for the removal of this suit into the circuit court of the United States for the southern district of New York, in the second circuit, in pursuance of the provisions
15 of section 630 of the Revised Statutes of the United States relating to the removal of suits from the State courts, and upon filing the security offered by said defendant according to the requirements of said section, and on motion of Coudert Brothers, attorneys for the said defendant, it is hereby ordered that the said security be accepted, and the said suit be removed into the next circuit court of the United States, to be held in the said southern district of New York, and that no further proceedings be had in said *court* in this court.

Witness the honorable , one of the judges of the court of common pleas, in and for the city and county of New York, and the seal thereof, this day of October, 1881.

16 Court of common pleas, city and county of New York.

THE PEOPLE OF THE STATE OF NEW YORK, plaintiffs,
against
THE COMPAGNIE GÉNÉRALE TRANSATLANTIQUE, defendant.

To the honorable the court of common pleas, in and for the city and county of New York:

The petition of the Compagnie Générale Transatlantique respectfully shows that your petitioner is the defendant in this suit, and that the same was brought by The People of the State of New York, plaintiffs, on or about the 12th day of August, 1881, in this court, and that your petitioner is and was, at the said time of bringing this suit, an alien; that is to say, a corporation created under and by virtue of the laws of France.

17 And your petitioner further respectfully shows that the said plaintiff claims in this suit, as against your petitioner, the sum of

seven thousand seven hundred and sixty-seven $\frac{50}{100}$ dollars, debt and penalty; and that the matter in dispute in this suit therefore exceeds the sum of five hundred dollars, exclusive of costs.

And your petitioner further respectfully represents that this suit is brought by the said plaintiff against the said defendant for the aforesaid alleged debt and penalty, with interest thereon, as and for a tax and penalty imposed by a certain statute of this State upon alien passengers brought to the port of New York by your petitioner, The Compagnie Générale Transatlantique, which statute, as your petitioner is advised and verily believes and charges, is in conflict with the Constitution of
18 the United States, and therefore void and of no effect.

And your petitioner further respectfully represents that this suit has not yet been tried, but the same is pending for trial in the court of common pleas of the city and county of New York, and that your petitioner desires to remove this suit before the trial thereof into the next circuit court of the United States, to be held in the southern district of New York, in the second circuit, in pursuance of the provisions of section 639 of the Revised Statutes of the United States.

And that your petitioner is ready and willing to give good and sufficient surety as this court may direct for its doing all acts and things required to be done by the said provisions of section 639 of the Revised Statutes of the United States upon the removal of a suit into the United States court, and offers herewith its bond, executed by Louis de Bebian and
19 William H. Schott, of the city of New York, as surety, in the penal sum of two hundred and fifty dollars, conditioned that your petitioner shall enter in the next circuit court of the United States, to be held in the southern district of New York, in the second circuit, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in this suit, and doing such other appropriate acts as by section 639 of the Revised Statutes of the United States are required to be done upon the removal of a suit into the United States court.

And your petitioner therefore prays that the said bond may be accepted as good and sufficient surety, according to the said provisions of section 639, and that the said suit may be removed into the next circuit court of the United States to be held in the southeen district of New York,
20 in the second circuit, pursuant to section 639 of the Revised Statutes of the United States, and that no further proceedings may be had therein in this court.

And your petitioner will ever pray, &c.

LOUIS DE BEBIAN.

Dated October 8th, 1881.

COUDERT BROS,
Atty's for Def't.

STATE OF NEW YORK,
City and County of New York, ss:

Louis de Bebian, being duly sworn, deposes and says that he is the agent of the Compagnie Générale Transatlantique in this city and State; that he has read the petition subscribed by him in behalf of the petitioner, and knows the contents thereof, and that the same is true to his own knowl-

edge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

LOUIS DE BEBIAN.

21 Subscribed and sworn to before me this 8th day of October, 1881.

[NOTARIAL SEAL.] D. E. SCHMIDT,
Notary Public, N. Y.

(Endorsed:) Court of common pleas, city & county of N. York. The People of the State of N. York, plaintiffs, ag'st The Compagnie Générale Transatlantique, defendant. Copy. Petition. Coudert Bros., atty's for def't, 68 & 70 William st., N. Y. City.

22 Court of common pleas, city and county of New York.

THE PEOPLE OF THE STATE OF NEW YORK, plaintiff,
against
THE COMPAGNIE GÉNÉRALE TRANSATLANTIQUE, defendant.

We, Louis de Bebian, of number 22 east 73rd street, and William Schott, of number 945 Broadway, both in the city of New York, are held and firmly bound unto the people of the State of New York in the sum of two hundred and fifty dollars, lawful money of the United States of America, to be paid to the people of the State of New York; for which payment, well and truly to be made, we hereby bind ourselves, our successors and assigns, firmly by these presents. Sealed with our seals; dated the 8th day of October, 1881.

23 Whereas a suit was brought on or about 12th day of August, one thousand eight hundred and eighty-one, in the court of common pleas in and for the city and county of New York, by the People of the State of New York against The Compagnie Générale Transatlantique, and the same is now pending in the said court, and is removable into the circuit court of the United States for the southern district of New York, in the second circuit, under the provisions of section 639 of the Revised Statutes of the United States. And whereas the said Compagnie Générale Transatlantique has filed or is about to file its petition in said court of common pleas for the removal of said suit into the next circuit court of the United States to be held in the southern district of New York: Now, therefore, the condition of the above obligation is such that if the

24 said Compagnie Générale Transatlantique shall enter or cause to be entered in the circuit court of the United States for the southern district of New York, on the first day of its stated session next ensuing after the order of the said court of common pleas for the removal of said suit into said circuit court, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit *into said circuit court, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit*, and do, or cause to be done, such other appropriate acts as by the provisions of section 639 of the Revised Statutes are required to be done upon the removal of a suit into the United States court, then the above obligation to be void; otherwise to remain in full force and virtue.

LOUIS DE BEBIAN. [L. S.]
WM. H. SCHOTT. [L. S.]

STATE OF NEW YORK,
25 *City and County of New York, ss:*

Louis de Bebian and William H. Schott, in the foregoing obligation named, being severally duly sworn, depose and say, and each for himself says, that he is a resident of the State of New York, and a householder therein, and is worth the sum of five hundred dollars over all his just debts and liabilities, and exclusive of property exempt by law from execution.

LOUIS DE BEBIAN.
WM. H. SCHOTT.

Subscribed and sworn to before me this 8th day of September, 1881.
[NOTARIAL SEAL.] D. E. SCHMIDT,
Notary Public, N. Y.

STATE OF NEW YORK,
City and County of New York, ss:

I certify that on this 8th day of October, 1881, before me per-
26 sonally appeared Louis de Bebian and William H. Schott, to me known and known to me to be the persons described in and who executed the foregoing instrument, and severally acknowledged that they executed the same.

D. E. SCHMIDT,
Notary Public, N. Y.

(Endorsed:) Court of common please, county of New York. The People of the State of New York, plaintiffs, against The Campagnie Générale Transatlantique, defendant. Copy. Bond of removal, &c. Coudert Bros., att'ys for def't, 68 & 70 William st., N. Y. City. Filed October 12, 1881. N. Jarvis, jr., cl'k.

27 N. Y. common pleas.

THE PEOPLE OF THE STATE OF NEW YORK *ag'st* THE COMPAGNIE GÉNÉRALE TRANSATLANTIQUE.

STATE OF NEW YORK,
City and County of New York, ss:

I, Nathaniel Jarvis, jr., clerk of the court of common pleas for the city and county of New York, do hereby certify that I have compared the foregoing summons, complaint, notice of appearance, petition for removal to the circuit court of the United States, and bond of removal each with the original thereof, on file in my office, and that each is a correct transcript of the original, with which it was so compared, and of the whole of said original.

28 SEAL COURT OF COMMON PLEAS, COUNTY OF NEW YORK. In witness whereof I have hereunto subscribed my hand and affixed the seal of said court this twelfth day of October, 1881.

(Sg'd) NATH'L JARVIS, JR., *Clerk.*

29 Circuit court of the United States, second circuit, southern dist. of N. Y.

THE PEOPLE OF THE STATE OF NEW YORK
against
THE COMPAGNIE GÉNÉRALE TRANSATLANTIQUE.

It is hereby stipulated and admitted by and between the attorneys for the respective parties to this action that the said action is brought and prosecuted under and pursuant to an act of the legislature of the State of New York, passed May 31st, 1881, and known as chapter 432 of the laws of 1881, and that the demurrer interposed by the defendant to the complaint or declaration of the plaintiffs is based upon the claim that the said act of said legislation is repugnant to the Constitution of the United States, and consequently null and void.

30 Dated New York, October 19, 1881.

(S'g'd) LEWIS SANDERS,
Pl'ff's Att'y.

(S'g'd) COUDERT BROTHERS,
Def't's Att'ys.

(Endorsed:) Circuit court of the United States, second circuit, southern dist. of N. York. People of the State of New York against The Compagnie Générale Transatlantique. Stipulation. Coudert Bros., def't's att'ys, 68 & 70 William st., N. Y. City. U. S. circuit court. Filed Oct. 20, 1881. Joseph M. Deuel, clerk.

31 *Demurrer.*

Circuit court of the United States for the southern district of New York, in the second circuit.

THE PEOPLE OF THE STATE OF NEW YORK, plaintiffs,
against
THE COMPAGNIE GÉNÉRALE TRANSATLANTIQUE, defendants.

The defendant demurs to the complaint of the plaintiffs in this action, and states as the ground of its demurrer that it appears upon the face of said complaint that it does not state facts sufficient to constitute a cause of action.

Dated New York, October 18th, 1881.

(S'g'd) COUDERT BROTHERS,
Att'ys for Def't,
68 & 70 *William Street, N. Y. City.*

32 (Endorsed:) U. S. circuit court southern district of N. Y. The People of the State of New York ag'st The Compagnie Générale

Transatlantique. Demurrer. Coudert Brothers, att'ys for def't, 68 & 70 William st., N. Y. City.

Service copy admitted.
N. Y. Oct. 19, 1881.

LEWIS SANDERS,
Pl'ff's Att'y.

U. S. circuit court. Filed Oct. 20, 1881. Joseph M. Deuel, clerk.

33 At a stated term of the circuit court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on Thursday, the 20th day of April, in the year of our Lord one thousand eight hundred and eighty-two.

Present, Hon. Samuel Blatchford, circuit justice.

THE PEOPLE OF THE STATE OF NEW YORK
against
THE COMPAGNIE GÉNÉRALE TRANSATLANTIQUE.

The demurrer in this action having come on for argument before the Hon. Samuel Blatchford, then circuit judge of this court, Mr. Coudert having been heard in support of said demurrer, and Mr.
34 Saunders in opposition thereto, and the court having rendered its decision by a written opinion sustaining the demurrer and ordering judgment for the defendant with costs, now, on motion of Coudert Brothers, attorneys for the defendant, it is ordered that the demurrer of the defendant to the complaint of the plaintiff in this action be, and the same hereby is, sustained, and that the defendant have judgment herein, dismissing the said complaint with costs.

(Signed) SAM'L BLATCHFORD.

(Endorsed:) Circuit court of the United States for the southern district of New York. The People of the State of New York against
35 The Compagnie Générale Transatlantique. Order sustaining demurrer. Coudert Brothers, attorneys for defendant, 68 & 70 William st., N. Y. City. U. S. circuit court. Filed Apr. 20, 1882. Joseph M. Deuel, clerk.

36 And the costs having been taxed by the clerk at fifty-seven and seventy-five one-hundredths dollars ($57.75), the process, pleadings, and decrees, together with other papers filed in said cause, are duly annexed hereunto.

Wherefore, let the said Compagnie Génêrale Transatlantique, defendant, recover of said The People of the State of New York, plaintiffs, the sum of fifty-seven and seventy-five one-hundredths dollars, as adjudged in said final decree, the costs and charges as taxed.

Signed and enrolled this 4th day of May, A. D. 1882.

(S'g'd) JOHN A. SHIELDS,
Deputy Clerk.

37 (Endorsed:) United States circuit court, southern district of New York. The People, etc., vs. The Compagnie Générale Transatlantique. Final record. Coudert Bros., def't's solicitors. 57.75 costs. U. S. circuit court. Filed May 4, 1882. Joseph M. Deuel, clerk.

38 Circuit court of the United States for the southern district of New York.

THE PEOPLE OF THE STATE OF NEW YORK
vs.
THE COMPAGNIE GÉNÉRALE TRANSATLANTIQUE.

BLATCHFORD, *J.*

This suit was commenced in the court of common pleas for the city and county of New York, and was removed into this court. The complaint was put in in the State court. It alleges that the defendant is and was, at the times thereinafter mentioned, a corporation formed under the laws of France, and owner of the vessels thereinafter named; that the defendant, by vessels from a foreign port, brought to the port of New York
39 alien passengers, for whom a tax has not heretofore been paid by the vessels on the dates from the ports and to the number stated in the complaint, being in June, July, and August, 1881, by 9 vessels, on 16 voyages, all from Havre or Marseilles, the number of alien passengers being in all 6,214; that the master, owner, agent, and consignees of such vessel, each and all, failed and neglected to pay or caused to be paid to the chamberlain of the city of New York, within 24 hours after the arrival of each of said vessels at the port of New York, or at any time, the sum of $1 for each and every of said passengers so brought as aforesaid, nor has any part thereof been paid; and that there is due to the plaintiffs from the defendant, by reason of the premises, the sum of $7,767.50,
40 debt and penalty, and interest thereon from the day after the entry of each vessel at the port of New York, for the tax and penalty imposed by law respectively, for which sum, with interest, the plaintiffs demand judgment, with costs. The defendant has put in in this court a demurrer to the complaint, which states, as the ground of demurrer, that it appears upon the face of the complaint that it does not state facts sufficient to constitute a cause of action. The parties, by their attorneys, have stipulated in writing that this action "is brought and prosecuted under and pursuant to an act of the legislature of the State of New York, passed May 31st, 1881, and known as chapter 432 of the laws of 1881;" and that the demurrer is based upon the claim that the said act "is repugnant to various provisions of the Constitution of the United States (par-
41 ticularly article 1, section 8, and subdivision 2 of section 10,) and also the Revised Statutes of the United States, and also to the provisions of the treaties now existing between the United States and France and other countries." The stipulation states that its intent is "to remove any question as to the right of the defendant to present and argue all such questions with the same force and effect as if the demurrer assigned various causes, separately setting up each and every objection that may be based upon the Constitution of the United States or of the State of New

York, or upon any existing treaties with foreign powers, or upon any alleged want of power on the part of the State to enact such a statute as that now sought to be enforced, or of the plaintiffs to bring and maintain this action."

42 The act of May 31st, 1881 (Laws of New York, 1881, chap. 432, p. 590), is as follows:

"§ 1. There shall be levied and collected a duty of one dollar for each and every alien passenger who shall come by vessel from a foreign port to the port of New York, for whom a tax has not heretofore been paid, the same to be paid to the chamberlain of the city of New York, by the master, owner, agent, or consignee of every such vessel, within twenty-four hours after the entry thereof into the port of New York.

"§ 2. It shall be the duty of the master or acting master of every such vessel, within twenty-four hours after its arrival at the port of New York, to report, under oath, to the mayor of the city of New York, the names, ages, sex, place of birth, and citizenship of each and every passenger

43 on such vessel, and, in default of such report, every passenger shall be presumed to be an alien, arriving at the port of New York for the first time. And in default of every such payment to the chamberlain of the city of New York there shall be levied and collected of the master, owner, agent, or consignee of every such vessel a penalty of twenty-five cents for each and every alien passenger, in addition to the duty heretofore imposed.

"§ 3. It shall be the duty of the chamberlain of the city of New York to pay over, from time to time, to the commissioners of emigration, all such sums of money as may be necessary for the execution of the inspection laws of the State of New York with the execution of which the commissioners of emigration now are or may hereafter be charged by law, and to

44 take the vouchers of the commissioners of emigration for all such payments. And it shall be the duty of the said chamberlain to pay over annually, on the first of January in each year, to the Treasury of the United States, the net produce of all the duties collected and received by him under this act, after the payments to the commissioners of emigration aforesaid, and take the receipt of the Secretary of the Treasury therefor.

"§ 4. The commissioners of emigration shall institute suits in the name of the People of the State of New York for the collection of all moneys due, or which may grow due, under this act, the same to be paid, when collected, to the chamberlain of the city of New York, to be applied by him pursuant to the terms of this act.

"§ 5. Section one shall not apply to any passenger whose passage

45 ticket was actually issued and paid for prior to the time this act takes effect, but every ticket shall be presumed to have been issued after this act takes effect in the absence of evidence showing the contrary.

"§ 6. This act shall take effect immediately."

Three days prior to the passage of the said act, and on the 28th of May, 1881 (Laws of New York, 1881, chap. 427, p. 585), an act was passed, as follows:

"§ 1. The commissioners of emigration are hereby empowered and directed to inspect the persons and effects of all persons arriving by vessel at the port of New York from any foreign country, as far as may be necessary, to ascertain who, among them, are habitual criminals or pauper luna-

ties, idiots, or imbeciles, or deaf, dumb, blind, infirm, or orphan persons, without means or capacity to support themselves, and subject to
46 become a public charge, and whether their persons or effects are affected with any infectious or contagious disease, and whether their effects contain any criminal implements or contrivances.

"§ 2. On discovering any such objectionable persons or effects, the said the commissioners of emigration and its inspectors are further empowered to take such persons into their care or custody, and to detain or destroy such effects, if necessary for the public welfare, and keep such persons under proper treatment, and provide for their transportation and support, as long as they may be a necessary public charge. The commissioners of emigration shall, in case of habitual criminals, and may in other cases where necessary to prevent such persons from continuing a public
47 charge, retransport such person or persons to the foreign port from which they came.

"§ 3. The commissioners of emigration are further empowered to board any incoming vessel from foreign ports arriving at the port of New York, by its agents and inspectors, who shall have such powers as may be necessary to the effectual execution of this act; and any person who shall resist them in the execution of their lawful function shall be guilty of a misdemeanor, and may be arrested by the officer resisted, and, upon conviction, may be sentenced to a term not exceeding six months in the penitentiary, or to pay a fine of one hundred dollars, or both.

"§ 4. This act shall take effect immediately."

These provisions were enacted with an endeavor to avoid the grounds on which former legislation had been held void, as repugnant to
48 the Constitution of the United States. The provisions of part 1, chapter 14, title 4, of the revised statutes of New York, which authorized the recovery from the master of every vessel arriving in the port of New York from a foreign port of a sum of money for each passenger, and appropriated the money to the use of the marine hospital, were held void. (The Passenger Cases, 7 How., 283, in January, 1849.) After that various amendments of the law were made, which came before the Supreme Court in Henderson v. The Mayor (2 Otto, 259), in 1875, and were held void. This legislation required a bond for each passenger landed by a vessel from a foreign port to indemnify the commissioners of emigration, and every municipality in the State, against any expense for the relief or support of the passenger for 4 years, but the owner or consignee
49 of the vessel could commute for the bond, and be released from giving it, by paying $1.50 for each passenger within 24 hours after landing him. If the bond was not given nor the sum paid within the 24 hours, a penalty of $500 for each passenger was incurred, which was made a lien on the vessel, collectible by attachment, at the suit of the commissioners of emigration. The statute applied to every passenger, and not merely to every alien passenger. It applied to every passenger by a vessel from a foreign port landed at the port of New York. The court held that the statute amounted to a requirement of the payment of the $1.50; that it was, in its purpose and effect, a law imposing a tax on the owner of the vessel for the privilege of landing in New York passengers transported from foreign countries; that, in tax-

ing every passenger, it taxed a citizen of France landing
50 from an English vessel for the support of English paupers landing at the same time from the same vessel; that a law prescribing the terms on which vessels shall engage in transporting passengers from European ports to ports of the United States is a regulation of commerce with foreign nations; that Congress alone could regulate such commerce; and that a State could not, under any power supposed to belong to it, and called police power, enact such legislation as that then under consideration. The court expressly reserved the question as to how far, in the absence of legislation by Congress, a State could, by appropriate legislation, protect itself against actual paupers, vagrants, criminals, and diseased persons arriving in its territory from foreign countries. A portion of the legislation of New York then under consideration
51 concerned persons who should, on inspection, be found to belong to those classes, but the court acted on and held void that part of the statute which applied to all passengers alike, and that part alone.

The act of May 31st, 1881, differs from the prior statute only in levying a duty of $1 for each alien passenger, instead of $1.50 for each passenger; and it may, perhaps, be limited to an alien who arrives for the first time. But it applies to such aliens who come as travellers for pleasure, and have means, and intend to go back, and to such aliens who come intending to remain, and have means, as well as to such aliens who are of the classes mentioned in § 1 of the act of May 28th, 1881. It compels the owner of the vessel to pay $1 for each of the alien passengers em-
52 braced in it for the privilege of landing him. The tax is expressly imposed for having the passenger come by the vessel from a foreign port to the port of New York. The new statute is as liable to the objections stated by the court in the Henderson case as was the statute in that case.

But it is contended that the provisions of § 3 of the act of May 31st, 1881, make the statute valid, as one laying an impost or a duty on imports for executing its inspection laws, under this provision of article 1, section 10, of the Constitution of the United States: "No State shall, without the consent of Congress, lay any impost or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States;
53 and all such laws shall be subject to the revision and control of the Congress." The act of May 28th, 1881, is the only so-called inspection law of the State of New York cited as one with the execution of which the commissioners of emigration are charged by law. The money received from the $1 tax for each alien passenger arriving for the first time is to be expended as far as necessary in executing the act of May 28th.

The question arises, therefore, whether the act of May 28th is an inspection law, within the meaning of article 1, section 10. Inspection laws were known when the Constitution was framed, in 1787, and what were inspection laws was well understood. They had reference solely to merchandise. Their object was to improve the quality of articles and fit
54 them for exportation or domestic use. (Gibbons v. Ogden, 9 Wheat., 1 and 203; 1 Kent's Comm., 439; Story on the Constitution, § 1017.) In No. 44 of the Federalist, article 1, section 10, of the Constitution, is commented on, and it is said that the manner in which the

restraint on the power of the States over imports and exports is there qualified, that is, in regard to inspection laws, "seems well calculated at once to secure to the States a reasonable discretion in providing for the convenience of their imports and exports, and to the United States a reasonable check against the abuse of this discretion." In Burrill's law dictionary "inspection" is defined thus: "Official view or examination of commodities or manufactures, to ascertain their quality under some statute requiring it." In Bouvier's law dictionary this is the definition:
55 "The examination of certain articles made by law subject to such examination, so that they may be declared fit for commerce." In Clintsman v. Northrop, (8 Cowen, 45,) the inspection laws of New York are said to be laws "to protect the community, so far as they apply to domestic sales, from frauds and impositions, and, in relation to articles designed for exportation, to preserve the character and regulation of the State in foreign markets." By the constitution of New York of 1846, (article 5, section 8,) all offices for "inspecting any merchandise, produce, manufacture, or commodity whatever" were abolished.

As the term "inspection laws" in the section under consideration refers only to laws for inspecting articles of merchandize, this shows that the terms "imports" and "exports" in the same section refer only to
56 articles of merchandise. Persons are not imports or exports or articles to be inspected, under the section. To pass a statute directing persons to be inspected, to ascertain their condition as to character or pecuniary means, or physical characteristics, and then another statute calling the first one an inspection law, does not make it an inspection law. It was not, and is not, and can never be, an inspection law, in the sense of the Constitution. Nor can passengers arriving in the United States be imports or exports, in the sense of the Constitution. In Brown v. The State of Maryland (12 Wheaton, 419, 437), the section referred to was under consideration, and it was said by the court, "What then is the meaning of the words 'imposts or duties on imposts or exports?' An impost or duty on imports is a custom or a tax levied on articles brought into a coun-
57 try, and is most usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles, if it were to be levied on them after they were landed. The policy and consequent practice of levying or securing the duty before or on entering the port does not limit the power to that state of things, nor consequently the prohibition, unless the true meaning of the clause so confines it. What then are imports? The lexicons inform us, they are 'things imported.' If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are
58 brought into the country. 'A duty' on imports then is not merely a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country. The succeeding words of the sentence, which limit the prohibition, show the extent in which it was understood. The limitation is, 'except what may be absolutely necessary for executing its inspection laws.' Now, the inspection laws so far as they act upon articles for exportation, are gener-

ally executed on land, before the article is put on board the vessel; so far as they act upon importations, they are generally executed upon articles which are landed. The tax or duty of inspection then is a tax which is frequently, if not always, paid for service performed on land, while the article
59 is in the bosom of the country. Yet this tax is an exception to the prohibition on the States to lay duties on imports or exports. The exception was made because the tax would otherwise have been within the prohibition." These observations are persuasive to show that persons are not imports or exports on the subjects of inspection laws, within section 10 of article 1. The word "imports" and the word "exports" must have equal extent and scope. The former can have no greater than the latter. The suggestion that persons departing from the United States by vessel could properly said to be exported, or to be exports, under any circumstances, even when retransported by public authority, is not one which commends itself to the general understanding. If not exports, they can not be imports. The fact that the importation of persons is refer-
60 red to in section 9 of article 1 has no effect to include persons within the word "imports" where that word is used. The clause referred to prevents Congress from prohibiting, prior to 1808, "the immigration or importation of such persons," as any of the States then existing should think proper to admit. So far as this section referred to the involuntary arrival of persons, it had reference to persons brought in to become slaves and articles of merchandise.

There is nothing authoritative in the passenger cases (7 How., 283), or in any other decision of the Supreme Court which conflicts with the foregoing views. The new statute of New York being void under the decision in the Henderson case, no authority upholding it as a law laying a duty on imports to execute an inspection law can be derived
61 from section 10 of article 1. In Railroad Co. v. Husen, (5 Otto, 465, 472) the principle of the Henderson case was affirmed and applied as a principle which forbids a State from burdening foreign commerce under the cover of exercising its police powers. It is such a burden to tax all alien passengers arriving by vessel for the first time; and the fact of examining or inspecting the persons of such passengers to see if they are good or bad, poor or rich, sane or lunatic, diseased or well, does not make the tax a tax to execute an inspection law. Under this guise any law which required examination of any person or thing, and which used the word "inspection," could be thereby made an inspection law, and the restraint of the Constitution could be frittered away, so long as the
62 duties laid did not exceed what was necessary to execute the particular law.

But there is, moreover, on the face of the act of May 28th sufficient evidence that it cannot be regarded as an inspection law. The acts of May 28th and May 31st cannot either of them derive any greater force from the fact that they are two acts than the enactments in the two would have if they were all in one and the same act. The act of May 28th goes beyond the inspection and the ascertainment of the facts prescribed, and authorizes the commissioners to take the objectionable persons into their care or custody, and provide for the transportation and support of such persons "so long as they may be a necessary public charge." Some of the objectionable persons are defined to be "infirm or orphan persons,

63 without means or capacity to support themselves, and subject to become a public charge." This is an eleemosynary system for supporting paupers, it may be, for their lives. Able-bodied aliens arriving here for the first time with means, in health, not among the classes called "objectionable" in the act, are to have a tax of $1 laid for each of them to support such system. This is not an inspection law. It is a direct interference with the exclusive power of Congress to regulate commerce with foreign nations.

It is urged for the plaintiffs that inasmuch as section 10 of article 1 declares that the State inspection law shall be subject to the revision and control of Congress, this court has no jurisdiction to revise or control the action of the State in enacting or administering the law. If the law is an inspection law, it is, as such, subject to the revision and control of
64 Congress. But this fact cannot deprive the court of its power of adjudging in a proper suit whether the law is an inspection law at all, or whether it is a law of another character.

It results, from the foregoing considerations, that the demurrer is sustained, and judgment is ordered for the defendant, with costs.

Lewis Sanders and George N. Sanders for the plaintiffs.
Roderic R. Coudert for the defendant.

(Endorsed:) Circuit court of the United States for the southern district of New York. The People of the State of New York vs. The
65 Compagnie Générale Transatlantique. Decision Feb'y 9th, 1882. U. S. circuit court. Filed Feb. 9, 1882. Joseph M. Deuel, clerk.

66 United States Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK, plaintiffs in error,
against
THE COMPAGNIE GÉNÉRALE TRANSATLANTIQUE, defendant in error.

Of October term, 1881.

Afterwards, to wit, on the third Monday of October, 1881, in this said term, before the judges of the circuit court of the United States for the southern district of New York, in the second circuit, came the said plaintiffs in error by Lewis Sanders, their attorney, and say that on the record and proceedings aforesaid there is manifest error in this, to wit, that the court ordered that the demurrer of the defendant to the complaint
67 of the plaintiffs in this action be sustained, and that the defendant have judgment dismissing the complaint with costs, whereas the whole sum of seven thousand seven hundred and sixty-seven $\frac{50}{100}$ dollars, with interest thereon from the fifth day of July, 1881, was then due and owing from the defendant to the plaintiffs; whereas the court should have directed judgment for the plaintiffs for said sum.

And this the said The People of the State of New York are ready to verify.

Wherefore plaintiffs pray that the judgment aforesaid for the errors may be revoked, annulled, and altogether held for nothing, and that plaintiffs may be restored to all things they have lost by occasion of the judgment aforesaid.

LEWIS SANDERS,
Plaintiffs' Attorney.

68 (Endorsed:) United States Supreme Court. The People of the State of New York, plaintiffs in error, against The Campagnie Générale Transatlantique, defendant in error. Assignment of error.

Due service of a copy within admitted.
N. Y., May 16, 1882.
(Signed) COUDERT BROTHERS,
Atty's Def't.
LEWIS SANDERS,
Plaintiffs' Attorney, 39 Nassau Street, New York City.

U. S. circuit court. Filed May 17, 1882. Joseph M. Deuel, clerk.

69 *Bond for damages and costs.*

Circuit court of the United States of America for the southern district of New York, in the second circuit.

THE PEOPLE OF THE STATE OF NEW YORK, plaintiffs in error,
vs.
THE COMPAGNIE GÉNÉRALE TRANSATLANTIQUE, defendant in error.

Know all men by these presents that we, Charles Hauselt, of the city and county of New York, and Louis A. Wagner, of the city of Brooklyn, county of Kings, all of the State of New York, are held and firmly bound unto the above-named, The Compagnie Générale Transatlantique, in the sum of two hundred and fifty dollars, to be paid to the said defendant in error, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the twelfth day of May, in the year of our Lord one thousand eight hundred and eighty-two.

Whereas the above-named plaintiffs in error have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named plaintiffs in error shall prosecute their writ of error to effect and answer all damages and costs if they fail to make their plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

(S'g'd) C. HAUSELT. [L. S.]
LOUIS A. WAGNER. [L. S.]

Sealed and delivered, and taken and acknowledged, this 12' day of May, 1882, before me.

MEYER AUERBACH,
Notary Public, N. Y. Co.

70 UNITED STATES OF AMERICA,
Southern District of New York,
City and County of New York, ss:

Charles Hauselt and Louis A. Wagner, being duly severally sworn, doth depose and say each for himself that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

(S'g'd) C. HAUSELT. [L. S.]
LOUIS A. WAGNER. [L. S.]

Sworn to this twelfth day of May, A. D. 1882, before me.

MEYER AUERBACH,
Notary Public, N. Y. Co.

(Indorsed:) U. S. circuit court. The People of the State of New York, plaintiffs in error, vs. The Compagnie Générale Transatlantique, defendant in error. Bond for damages and costs on . Lewis Sanders, pl'ff's att'y.

Approved May 13, 1882.
(Signed) WM. J. WALLACE.

U. S. circuit court. Filed May 16, 1882. Joseph M. Deuel, clerk.

71 UNITED STATES OF AMERICA, *ss:*

To the Compagnie Générale Transatlantique, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, eighteen hundred and eighty-two, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein The People of the State of New York are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated New York, May 13th, 1882.

WM. J. WALLACE.

72 (Indorsed:) E. & A. A. 374. U. S. Supreme Court. The People of the State of New York, plaintiffs in error, against The Compagnie Générale Transatlantique, defendant in error. Citation. Lewis Sanders, pl'ffs' att'y, 39 Nassau st., N. Y. City. Mess. Coudert Bros., def't's att'y, 68 William st., N. Y. City. Received by Coudert Brothers May 16, 1882. U. S. circuit court. Filed May 17, 1882. Joseph M. Deuel, clerk. 10. 376.

73 United States Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK, plaintiffs in error,
against
THE COMPAGNIE GÉNÉRALE TRANSATLANTIQUE, defendant in error.

Due service of a copy of the citation herein, returnable the second Monday of October, 1882, is hereby admitted.

COUDERT BROTHERS,
Att'ys for Def't.

NEW YORK, *May* 16*th*, 1882.

74 (Indorsed:) United States Supreme Court. The People of the State of New York, plaintiffs in error, against The Compagnie Générale Transatlantique, defendant in error. Admission of service of copy of citation, returnable second Monday in October, 1882. U. S. circuit court. Filed May 24, 1882. Joseph M. Deuel, clerk. Lewis Sanders, plaintiffs' att'y, 39 Nassau street, N. Y. City.

(Indorsement on cover:) No. 867. The People of the State of New York, plaintiff in error, vs. The Compagnie Générale Transatlantique. S. New York, C. C. U. S. Filed 29th June, 1882.

OFFICE SUPREME COURT U.S.
FILED
DEC 13 1882
JAMES H. McKENNEY, Clerk.

17-37

SUPREME COURT OF THE UNITED STATES.

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiffs in Error,

vs.

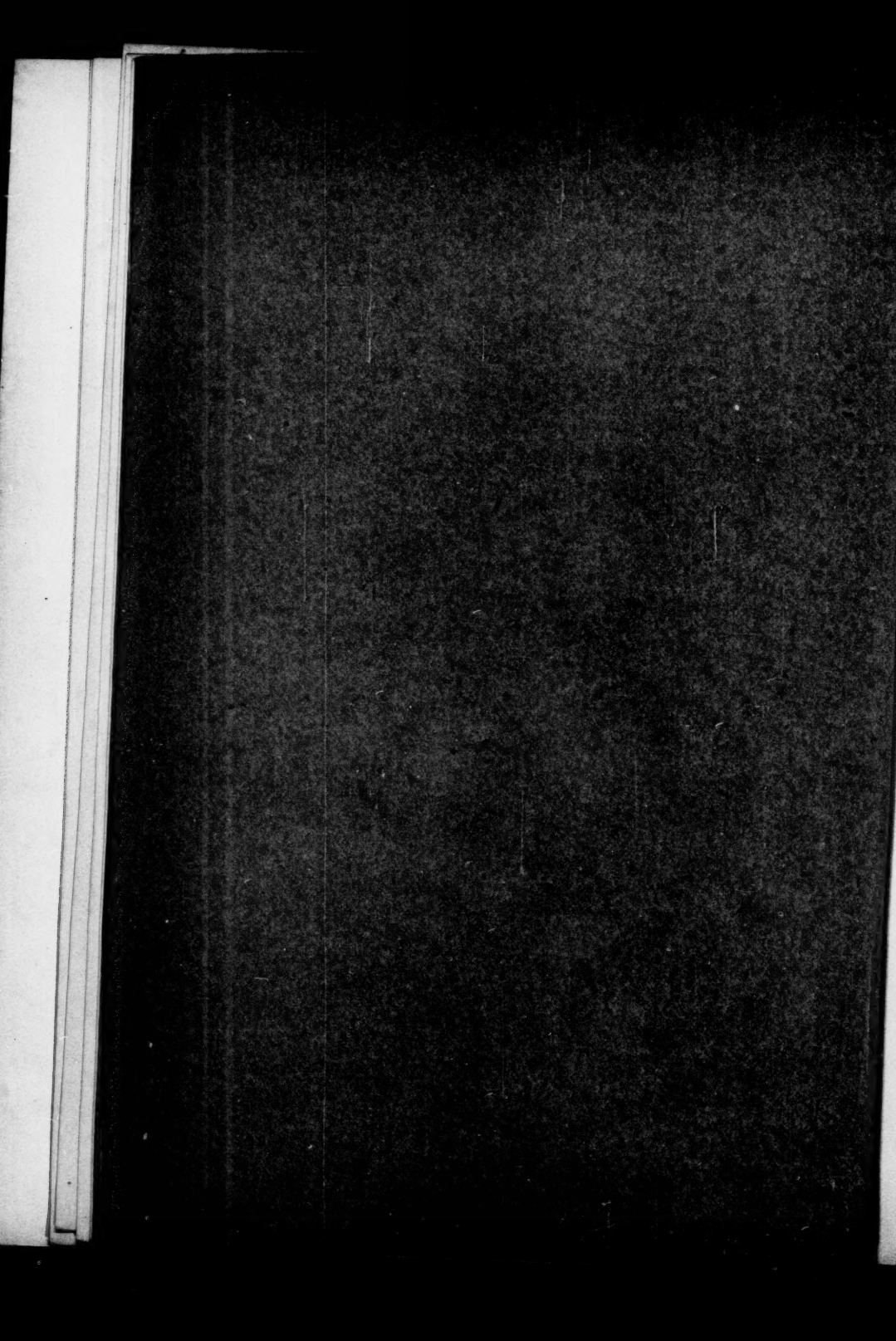
THE COMPAGNIE GENERALE TRANSATLANTIQUE,
Defendants in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES,
FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF AND POINTS FOR PLAINTIFFS IN ERROR.

WILLIAM M. EVARTS,
LEWIS SANDERS,
GEORGE N. SANDERS,
Of Counsel.

BURGOYNE, Law Case Printer (Law Telephone 587), 57, 59 & 61 Park Street, N. Y.



United States Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiffs in Error,

AGAINST

THE COMPAGNIE GENERALE TRANSATLANTIQUE,
Defendants in Error.

Statement and Brief for Plaintiffs in Error.

Abstract of Case.

The plaintiffs below bring this writ of error to reverse the decision of the Court below, holding unconstitutional Chapter 432, Laws of State of New York, levying tax for execution of immigration inspection laws.

THE LAWS IN ISSUE.

The Laws of New York in issue are, *first* (Chap. 427, Laws 1881, full text in Points), for the inspection of alien immigrants and their effects, and, *second* (Chap. 432), an impost on the importers thereof, of one dollar per immigrant to defray the expense "*necessary for the execution*" of said Inspection Laws, to secure the exclusion from the community of "habitual criminals" and "*pauper* lunatics, idiots or imbeciles or deaf, "dumb, blind, infirm or orphan persons, without means or "capacity to support themselves and subject to become a public "charge," and also "persons or effects affected with any "infectious or contagious disease, and whether their effects "contain any criminal implements or contrivances." The

balance, if any, is required to be covered into the United States Treasury, pursuant to Art. I., § 10, subd. 2 U. S. Constitution.

This tax is thus strictly limited to the expense "*necessary to the execution of the inspection,*" whatever that limit may be.

These two acts will be found in full *infra.*

It is stipulated that the demurrer "is based upon the claim "that the said Act of said Legislature is repugnant to the Con- "stitution of the United States, and consequently null and "void" (fol. 29).

Assignment of Errors.

The errors of the Court below are:

FIRST. In assuming that none but negroes imported *to be* sold into slavery are the subjects of importation—while as matter of fact large contracts have been made annually to import persons from Europe—Mennonites have been imported and settled on railroad lands by the thousand; the Mormons are constantly importing persons, and contracts for the importation and settling of persons have been, and are now the subject of litigation in the United States Circuit Court for the Southern District of New York.

SECOND. The Court below erred in confining the term "inspection," as found in the Constitution, to such persons as were bound to service, and therefore merchandise.

THIRD. The Court erred in making the validity of the Inspection Law depend upon the fact that persons were imports or the subject of importation. If persons were not imports, then they did not come within the constitutional inhibition, "No State "shall, without the consent of Congress, lay any import or "duties on imports or exports." On the other hand, if persons are imports, or the subject of importation, they come within the exception, "except what shall be absolutely necessary for "executing its inspection laws."

FOURTH. The Court erred in deciding that the regulation of criminal and pauper immigration was a regulation of commerce, and that a tax fee imposed to execute such regulation was a regulation of commerce.

FIFTH. The Court erred in holding that the taxing power is

exercised under the power to regulate commerce, and that the State tax is a regulation of commerce.

SIXTH. The Court erred in not deciding that the State Inspection Law was the valid exercise of a constitutional power by the State; and that the inspection impost was rightly imposed, and that Congress had authorized the State to levy the tax.

Preliminary Argument.

DIFFERENCE BETWEEN THIS AND FORMER TAXES. The former taxes were unconstitutional because not limited to any necessary expense occasioned the State by the importation of immigrants nor applied to a constitutional object.

IN THE PASSENGER CASES the tax was for the support of the Marine Hospital, open to the city poor, and for the New York Society for the Reformation of Juvenile Delinquents, having no reference to immigrants.

IN THE HENDERSON CASE two-thirds of the tax were applied to the paternal supervision over *all immigrants* to secure them employment and homes, etc., and the *charitable support* of all who should *become* paupers within four years after landing, the other third being distributed to all the counties of the State.

IN THE CHY LUNG CASE the inspection-charges were applied to the support of all the indigent of California, and were held void on that ground as well as because the other provisions of the law were unconstitutional; but this decision contains a direct intimation that inspection-charges property limited and applied might be constitutional.

IN THE CASE AT BAR the inspection tax or impost is strictly limited to the execution of an inspection law of established constitutionality, any possible balance going into the United States Treasury pursuant to the Constitution.

THE ISSUE.

The Circuit Court held this tax unconstitutional on the ground that it was in conflict with the *latent* power of Congress to regulate commerce.

On the contrary:

1st. It was settled in *Gibbons* vs. *Ogden*, and is now held to

be "*stare decisis*" here, that no *form* of taxation for revenue is a regulation of commerce and that, therefore, State imposts on imports are not prohibited by the commerce clause, but only by the express prohibition against them. Taxation to become a regulation of commerce must be so levied as to have that "*purpose and effect*," as said in the *Passenger* and *Henderson Cases*. *There* it was held that a general tax on the importation of immigrants, not being limited to any necessary expense occasioned to the State thereby, was "*in its purpose and effect*" an unlimited tax on the mere "*privilege of landing passengers*," sustainable only on "*the assumption that the State may enforce a non-intercourse law excluding all aliens*," "*may prescribe the conditions of their entrance whether it be the payment of two or two hundred dollars*," and that this assumption conflicted with the control of Congress over commerce, the "*excluding of all aliens*" being a subject of essentially national character and therefore under the exclusive regulation of Congress. This *theory* was essential to the ruling, it could not be sustained on any other without overruling Gibbons vs. Ogden, that taxation for revenue is not a regulation of commerce, and the now settled decisions that only such subjects as are essentially national, or *require* uniformity of regulation throughout the United States, are under the exclusive jurisdiction of Congress. It is plain that the *theory* of the former non-limited taxes being void because assuming the right to "*exclude all aliens*," logically sustains the present tax, which is only an exercise of the acknowledged right to exclude paupers, etc., from the community, being strictly limited to revenue for that purpose. The aforesaid *theory* was that a tax of "*two dollars*" unlimited by any constitutional principle was as obnoxious as a tax of "*two hundred dollars;*" *because*, if allowed, there was nothing to prevent a prohibitory increase. But the defense attempt to take the ruling established on this theory, and apply it, *contrary thereto*, to the overturning of a tax limited to the necessary expense of executing a valid law for the exclusion of paupers, etc. It is said that a tax non-prohibitory in amount for the exclusion of rightly prohibited persons is just as much prohibitory as a tax prohibitive in principle upon all aliens because levied for the mere privilege of landing and not limited by any constitutional principle. This Court only decided that a tax thus prohibitory in principle was invalid, equally whether two or two hundred dol-

lars a head. The illustration by the Court makes it plain that it was not the amount but the principle upon which it was levied that determined the unconstitutionality of the tax. In the case at bar, the principle upon which the tax is levied has the decisions of this Court and an Act of Congress to sustain it, and the demurrer concedes the question of fact that the *amount* of the tax is not prohibitive.

While the *theory* of the former ruling sustains the present tax, and the ruling itself can not be sustained on any other *theory*, yet we can not but see that the ruling, on whatever theory was in conflict with the best settled decisions.

If the former taxes were levied only for revenue, although not for an appropriate object, still they were not a *regulation of commerce* unless levied with that "*purpose*" or "*effect.*" They were certainly not levied with that *purpose*, and could not have that "*effect*," unless large enough to diminish immigration. *That* could not be assumed *without evidence*, any more than as to any other class of importations. Now, it is distinctly held that State imposts on imports would not conflict with the commerce clause unless so levied as to have that purpose or effect, that is, prohibitory or discriminating in fact. It certainly seems rather premature to stop a tax as prohibitory when it is not so, on the theory that the allowance of a non-prohibitory tax would sanction a prohibitory one. If its being prohibitory is all that makes it a regulation of commerce, it certainly does not become so by anticipation before reaching the prohibitory limit, otherwise a tax of one mill would be prohibitory, and the theory which condemned a tax only as prohibitory would be made to prohibit all taxation.

This point was not raised or the Court would not have held the tax to be a regulation of commerce. As the Court recently held that a State tonnage-tax for revenue, although not for an appropriate object, was not void as a regulation of commerce, but only as a tonnage tax (Peete vs. Morgan, *post*); so the former taxes were void as imposts on imports, but not as regulations of commerce.

The recent half-dollar tax imposed by Congress "to defray the expense of regulating immigration and for the care of immigrants," presents the subject in a form where the mind intuitively detects the fallacy of calling it a regulation of commerce. Clearly it is the law "*regulating immigration*" and not

the mere tax "*to defray the expense*" thereof, that is a regulation of commerce, if any.

Similar misapplication of authorities has already been attempted and rejected in the Wharfage cases, where it was held that a ruling against any tax on the *mere privilege* of landing cargo and passengers in a harbor had no application to charges for the *necessary expense* of maintaining a wharfage system, for such landing *including expense of compulsory supervision thereof*, although the charges were levied *in the form of a tonnage tax*. The present tax is not a tax in the sense of an arbitrary exaction levied in the assertion of sovereignty, but is an inspection charge averaged *per capita* as the only practicable mode of assessment. It is not levied for the operation of internal government, or police, or charity.

2d. THE STATE'S POWER to pass a law excluding certain persons from the community carries with it the power to levy the expense of executing that law on the parties causing the same. The quarantine charges on imports are assessable alike on the owners of the imports, and the owner of the vessel importing them. *A fortiori* are such charges assessable on the owners of vessels importing paupers unable to pay for themselves. The right to enforce a pilotage system with its charges is well founded in the right and duty of protecting the lives and property of citizens presumptively embarked in vessels plying to and from State ports.

It is the expense of foreign paupers being thrown upon the State that is to be protected against. That protection can only be effectuated by making the importers of them pay the cost of their exclusion. To deny this is to deny the protection altogether. The paupers cannot pay the expense.

3d. THE PRESENT TAX is also within the precise principle and technical designation of inspection, quarantine and wharfage charges, all of which are included herein. The principle in all these cases is that COMMERCE MUST BEAR ITS OWN BURDENS.

4th. THAT THE "IMPORTATION OF PERSONS" was regarded as a subject of "*tax or duty*," the Constitution says in those very words without restriction to slaves. *Gibbons vs. Ogden* affirms this and some of the prevailing opinions in the *Passenger* cases. The only doubt ever expressed was as to whether the term "*immigrant*" is included in the term "*import*." Of course not, for he cannot be said to import himself. An *immi-*

grant might walk across the Canadian frontier, when he would clearly not be an *import*. But when any persons, either free or slave, are by levy on the party importing them taxed as an "*importation*" that is clearly an impost on "*imports*." The "*importation*" is the "*import*" whether slave or free. This is conceded as to slaves; but the only distinction between them and free persons is that the former are essentially imports as merchandize, while it is only when the *importation of the latter is taxed* that they are are also in the nomenclature of taxation, the "*imports*" taxed. When it is the *owner of the vessel*, and not of the slaves, that is taxed there is no possible distinction between them and free persons. It is certain that the sweeping prohibition against State imposts meant to cover all. The hypercriticism, which says, that the term *transportation* is more applicable to *persons*, applies equally to transportation of baggage, and would, if effectual, take that also out of the term "*imposts*" and of the prohibition against imposts thereon. The defense must prove that people would be more properly designable as *transports*. Grammatically speaking, everything is at once *trans*ported across the ocean and *im*ported into the country. One term views the operation with respect to the *transit*, and the other in regard to the *terminus*.

This enforces the distinction between the former and present taxes, the former being within the prohibition against the State imposts on imports, and the latter within the "except what "may be absolutely necessary for executing its inspection "laws."

5th. That "Inspection Laws" necessarily extend to all persons who are *per se* "*imports*," as slaves and white apprentices, and bound-servants, all actually designated "*imports*" in the old Statutes, is certain. This shows that State laws for the *inspection of persons* are recognized and maintained by the express terms of the Constitution. If, then, those persons cease to be "*imports*" on being freed, they are simply taken out of the prohibition against imposts on imports. This escape from the general prohibition certainly would not raise an implied prohibition against the tax for their inspection. The implication is the other way, viz., that the inspection tax only required to be excepted from the prohibition against imposts on imports and was not in conflict with the commerce clause, and it was so held in Gibbons vs. Ogden.

The object of inspecting imports is manifestly to exclude whatever is objectionable. What the Constitution permits the State to exclude is the limitation. This has already been decided as to paupers, &c.

All the adverse definitions of "inspection laws" will be found to be mere historical references to the existing inspection laws as to exports, and their very limitations defeat their authority, by being entirely inapplicable to imports. The question as to imports has simply never been before the Courts before. There were no inspection laws as to imports; the provision for them was entirely prospective and therefore wholly unrestricted by precedent. Now, the "inspection" of persons has always been designated *an "inspection"* wherever made in the army, navy, police, &c., and the term "inspection" of persons is expressly sanctioned by its use in the Henderson Case where the Court say: "The portions of the New York statute, which concern *persons*, who on *inspection* are found to belong to these classes (paupers, criminals, &c.,) are not properly before us."

In Railroad Co. vs. Husen (95 U. S., 470) speaking of the Henderson and Chy Lung cases, it is said that they "refer to obstructions against the admissions of persons into a State, but the principles asserted are equally applicable to all subjects of commerce."

Conversely, the objections as to this inspection impost have no more application than they would with respect to an inspection impost of 10 cents per head for the inspection of cattle and the exclusion of the diseased.

In the *Passenger Cases* Chief Justice Taney's opinion, expressly concurred in by Nelson, J., fully sustains the view here presented, and is nowhere contradicted on this point by the prevailing opinions. He says:

"If passengers are *imports* then their condition may be ex-
"amined and inspected by an officer of the State like any other
"*import*, for the purpose of ascertaining whether they may
"not, when landed, bring disease or pauperism into the State.
"* * They (the States) have, THEREFORE, UNDER THE CLAUSE
"OF THE CONSTITUTION ABOVE MENTIONED, THE POWER TO LAY A
"DUTY ON THIS IMPORT, AS IT IS CALLED, TO PAY THE NECESSARY
"EXPENSES OF THE INSPECTION." (7 How., 478 and 518.)

6th. AS TO THE OBJECTION TO THE TAX BEING UNIFORM, to which the defence reduces: 1st, If it is an "*inspection impost*,"

it is within the express terms of the Constitution, and the very definition of *impost* involves uniformity. A variable charge would not be an impost at all. But, again, if it is not technically an "inspection impost" designated in the Constitution, but only identical in principle, still that *principle* cannot be held unconstitutional; 2ndly, The tax is not on one immigrant to pay for another, as falsely assumed, but on the *owner of the vessel* to pay for all. Now, if he is liable to pay $1,000 for 1,000 immigrants, it is plainly immaterial whether it is assessed by an average or aggregate estimate; 3dly, As held with respect to pilotage and wharfage levied on the tonnage of vessels, the *method* is not unconstitutional, although the levy of 7½ cents per ton on a hundred ton vessel for landing a single passenger at St. Louis, *results in $7.50 charge for landing such passenger*, and pilotage charges are as great on an empty as a full vessel, showing that this averaging of charges by tonnage is not nearly as equitable as the averaging of inspection charges on immigrants. The latter must, as a question of fact, be assumed to be perfectly equitable on this demurrer. As long as the total charge is not excessive with relation to the cost of maintaining the entire system, the charges will be maintained. In fine, it is merely a question of excess, a traversable issue of fact not before the Court; 4thly, It is practically impossible to levy this tax in any other way; 5thly, The *method* of this tax is subject to the exclusive revision and control of Congress.

6thly. U. S. R. S. (§ 2164) requires that every "*tax or* "*charge* imposed or enforced by any State on any person immi- "grating thereto from a foreign country" shall be "*equally* "*imposed and enforced upon every person immigrating to such* "*State* from any foreign country."

THE TEST OF CONSTITUTIONALITY APPLIED.

(*a*) The Supreme Court has now settled, by decisions "expressing the final judgment of the Court," as said in Mobile vs. Kimball (1880), as to the limits of State action affecting foreign and inter-state commerce that "whether the power in any given case is vested exclusively in the general government depends upon the nature of the subject to be regulated," and that the test to be applied is:

Is the subject "*national*" in its "*character*" or such as to "*require uniformity of regulation, affecting alike all the States,*"

so that the mere "inaction" of Congress is equivalent to a declaration of its purpose, that the State shall not act in the premises? If so, the control of Congress is exclusive; but if, on the contrary, the subject is neither national nor requires uniformity of regulation, *then* the "*inaction*" of Congress is held "to be a "declaration that for the time being and until it sees fit "to act, they (such subjects) may be regulated by State au- "thority."

First, as to the laws in issue:

Is the subject of the inspection of alien immigrants for the exclusion of pauper imbeciles, &c., from the port of New York, so "national in its character, that the law therefor, with an impost on the importers, to defray the expense occasioned by their importations, "requires uniformity of regulations, affecting alike all the States," so that the "*inaction*" of Congress in failing to protect the State is equivalent to a declaration that the State shall not protect itself, whether against the incursion of paupers or against the expense occasioned by their being brought to its ports?

There can be but one answer to this whole question.

"*The subject*" is not national, and the impost limited to the subject, and the parties occasioning the expense, is within "*the* "*subject.*" It is clear, if the States are reserved the power to protect themselves against foreign paupers, that they are therein reserved the power to protect themselves against the *expense* of them, for that is precisely what the State is to be protected against; and the expense of *excluding* them, is manifestly the least possible expense the State can incur, and therefore, the least open to objection. This expense must be assessed on the importer, for the *pauper cannot* pay it.

This same principle has already been established by this Court in sustaining quarantine charges thus: "It is evident that the "power to establish quarantine regulations cannot be executed "without the State possesses the means to raise a revenue for "their enforcement." Peete vs. Morgan, 19 Wall., 582.

Now, this Court has uniformly declared that "*the subject*" is not "*national,*" saying in the Railroad Co. vs. Husen (95 U. S., 472) that a State "may exclude from its limits convicts, paupers, idiots and lunatics and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases." "For the purpose *of self-protection* it

may establish quarantine and reasonable inspection laws." The Court say as to all these points: "*We unhesitatingly admit*" them. The same principles were affirmed in the *Passenger Cases*, *Gibbons vs. Ogden*, *Patterson vs. Kentucky*, &c., &c., *post.*

Accordingly, the Constitution, having *maintained in the States* this right of inspection, cannot be *implied* to have meant to deprive them of the right to levy an impost limited to the subject and object of that inspection. It cannot be *implied* and there is no pretense of an express prohibition. On the contrary, the contemporaneous inspection laws admitted to be constitutional *embodied a levy of charges for their execution*, showing how constitutionally inseparable are the inspection and impost.

This Court unanimously held, in *ex parte* McNeil (13 Wall., 236, 238–240), that the control of Congress over the regulation of commerce was only exclusive where from the nature of the case uniformity was an absolute necessity, and not merely possible, saying:

"Some of the rules prescribed in the exercise of that power "(to regulate commerce) *must, from the nature of things, be* "*uniform throughout the country. To that extent* the power "itself must necessarily be exclusive, as much so as if it had "been so declared to be by the organic law in express terms. "Others may well vary with the circumstances of different "localities. In the latter contingency the State may prescribe "the rules to be observed until Congress shall supersede them; "the Constitution and laws of the United States in such cases, "as in all others to which they apply, being the supreme law "of the land." In this view there can be no conflict between the present laws and the Constitution or Congress, these laws being passed in expressed recognition of the Constitution as supreme, and of its giving the revision and control to Congress.

The principle of the above decision becomes very clear when it is considered that quarantine and pilotage charges are susceptible of being controlled by national boards with uniform regulations, but do not require it, and so are within the power of the States until Congress assumes such control.

(*c*) It is clear that if an impost is not *per se* a regulation of commerce, it does not become so by being levied to execute a constitutional inspection law. That an impost is not a regulation of commerce *per se* has recently been declared to be "*stare decisis*" by this Court, saying that it is the "settled rule of con-

"struction that the commercial clause of the Constitution "neither confers, regulates, *nor prohibits* taxation." This decision, *Transportation Company vs. Wheeling* (99 U. S.) cites Gibbons vs. Ogden, which holds that "*there is no analogy, therefore, between the power of taxation and the power to regulate commerce.* The Constitution considered these as substantive and distinct from each other."

In this light it becomes a patent misnomer to designate as an "unconstitutional regulation of commerce" an impost limited to the enforcement of a constitutional inspection law, whether it be included in the inspection imposts expressly sanctioned by the Constitution or not.

(*d*) The application of the above test to the unconstitutional head-moneys demonstrates the distinction. Each of the laws there in issue was, as declared in the Henderson Case, "*in its purpose and effect*," a general tax on the *mere* "*privilege of land-*"*ing in New York passengers transported from foreign* "*countries*" (92 U. S., 268–9), affirming the passenger cases, holding that "the assumption is that a State may enforce a non-intercourse law excluding all aliens" "may prescribe the conditions of entrance, whether it be the payment of two or two hundred dollars" (7 How., 461).

Application of the test: Is the subject, the exclusion of all immigrants by prohibitive taxation, so "*national*" in its "character" as to "require uniformity of regulation affecting "alike all the States," and is the "inaction" of Congress equivalent to a declaration that they shall not be excluded?

Undoubtedly. The exclusion of immigrants in general from the port of New York would affect the whole Union, and if allowed and extended to other ports, would make a complete blockade. Such a law was very properly said (7 How., 412–14, and 288), to be in violation of the prohibition against *imposts on imports;* of the commerce clause; of the treaties for free intercourse; of the naturalization laws, and Acts of Congress admitting artisans' luggage free of duty, all showing the intention of Congress to admit foreigners; and also of the "first clause of the eighth section of the first article of the Constitution, which enjoins that all duties, &c., shall be uniform throughout the United States."

(*e*) The only further question before the Court was: Did the *application* of the tax *validate it?* The tax at issue in the

Henderson Case was one dollar and a half a head, and the *application* was one dollar of the tax "to the Commissioners of Emi- "gration for their general purposes and particularly in erecting "wharves and in paying salaries and clerk hire, and fifty cents "to the other counties of the State." These "general purposes" were simply to exercise a sort of charitable supervision over *all immigrants* for "*four years*" after their landing, beginning with finding them employment or homes on their arrival and ending with giving them refuge in one of the institutions of the commission if, for any cause, they became in need thereof at any time before the expiration of four years, no matter how robust, rich and unexceptionable they may have been when first brought here. The tax was not applied to the execution of any inspection law nor limited in any way to necessary expenses occasioned by the importation of paupers, &c. *There was no inspection law*, either in name or effect to be executed. The commissioners were, indeed, empowered to make examination of all passengers for their own information, but this was not effectuated as an inspection law by excluding the persons found to be obnoxious as a result of such examination. The whole system was a charitable one, applicable to all immigrants for four years after their arrival, with some possibly necessary expenses, indeed, but indistinguishably involved in the general charitable outlay.

The question, then, was: Did the application of the tax to New York's general charitable supervision over all immigrants for a period of four years, validate the tax? Was that an expense which either the importer or the immigrants were under any obligation to pay? Certainly not. If New York wished to be charitable, she could not be so at the expense of commerce nor with money extorted from others. Well did the Court say: "No just rule can make the citizen of France landing from an "English vessel on our shores liable for the support of an "English or Irish pauper." If such a tax could be sustained, a State might extend it so as to give all immigrants pensions in their old age.

In the *Passenger Cases* the tax was on all passengers, citizen and alien, foreign and coastwise, and was applied first to the Marine Hospital, not confined to immigrants; and secondly, to the New York Juvenile Orphan Asylum. This was a still more unwarrantable application than in the *Henderson Case*. Yet

the leading opinion by McLean, J., whose change of vote would have turned the decision, expressly refrains from deciding whether a tax limited to the support of the Marine Hospital would have been valid, saying: "It is insisted that, if the Act "as regards the *hospital fund* be within the power of the State, "the application of a part of the fund to *other* objects as pro- "vided in the Act cannot make it unconstitutional. *This argu- "ment is unsustainable.*"

How different is the present case? Can it, indeed, in like manner be said that "No just rule can make" the importer of immigrants pay the necessary expense occasioned to the State by their general inspection and the exclusion of paupers, lunatics, criminals, &c.? It is true that the execution of this law necessarily involves the temporary support of some of these people in the process of its execution, as their return-ticket to Europe would necessarily include meals and sleeping accommodations, but that does not make the ticket come under the charitable heading of being given for their support. So it may be necessary to keep persons temporarily who are so disabled by sickness or otherwise, as to be unable to stand a voyage. If the importer brings them here in such a condition, the consequent expense of their necessary care, is a necessary expense occasioned by his act, for which he must be held legally responsible.

It is worthy of note that *even as to the application of the head-moneys* validating the tax, the Supreme Court were divided five to four in the *Passenger Cases*, and that even in the *Henderson Case* the Court, although unanimous, say, with reference to the narrowness of the line which divided the head-moneys from constitutionality: "It must occur very often that the shading which marks the line between one class of legislation and another is very nice and not easily distinguishable."

Therefore, since it has been held that the application of the tax to mere charitable purposes was just outside the line of constitutionality, it is a logical conclusion that the application to necessary expenses occasioned by the immigrant is within that line.

(*f*) The defense sought to be based on the *Henderson Case* is misplaced upon a paragraph added to the decision, *pro bono publico* advising Congress that it had power to take exclusive charge of "*the whole subject*" of regulating immigration, thus: "We are of opinion," says Mr. Justice Miller, "that this whole

" subject has been confided to Congress by the Constitution that " Congress can *more appropriately* and with *more acceptance* " exercise it *than any other body known to our law, State or* " *national;* that *by providing a system of laws in these matters* " *applicable to all ports* and to all vessels, *a serious question,* " which has long been matter of contest and complaint, *may be* " *effectually and satisfactorily settled.*"

It will be noted that if the phrase "*this whole subject has been confided to Congress*" bore defendants' construction and was a part of the adjudication it would preclude the States from any inspection of immigrants or exclusion of paupers, as well as from any inspection-impost therefor; on the contrary, the plain intimation is that there may be some "other body," and *that a State body,* which might exercise the same powers, and that, therefore, Congress should "*provide a system of laws in these matters applicable to all ports* and to all vessels," so that a "*serious question*"—" may effectually and satisfactorily " be *settled.*" Of course the question thus to "*be settled*" was not already settled by the decision.

That this is the true import of the above paragraph is shown by the learned Justice saying in the next one: "Whether in the " absence of such action" (by Congress) "the States can or how "far they can by appropriate legislation protect themselves," &c., "*we do not decide.*" And again the immediately succeeding opinion in the *Chy Lung Case,* written by the same learned Justice, repeating that: "We are not called upon by this statute " to decide for or against the right of a State to protect herself "by necessary and proper laws against paupers," &c., adds: " such a right can only arise from a vital necessity and *cannot be* " *carried beyond the scope of that necessity. When* a statute " *limited to provisions necessary and appropriate to that object* " *alone* shall in a proper controversy come before us *it will be* " *time enough to decide that question.*"

That this question included the matter of inspection charges is further shown by the fact that the inspection charges in the *Chy Lung case* were virtually a tax of seventy-five cents a head, "the Commissioner" being "authorized to charge the sum of seventy-five cents for the examination of a passenger" —a tax of seventy-five cents instead of a dollar for every passenger inspected; yet the Court placed the unconstitutionality of this inspection tax in the Chy Lung Case not upon the broad

ground that *any such charges* would be void as a regulation of commerce, but on the ground that the money was not applied to inspection purposes nor even to the benefit of the immigrants, saying: "The money, when paid, does not go to any fund for "the benefit of the immigrants, but is paid into the general "treasury of the State, and devoted to the use of all her indi- "gent citizens." And the Court say in a later case as to each of the statutes involved in the *Henderson* and *Chy Lung* Cases that it went "far beyond its professed object." (Railroad Co. vs Husen, 95 U. S., 472).

If the Court, having decided the Henderson Case at the same time, intended *that* to be a decision that any tax on the importation of immigrants, even a *per capita* inspection charge like that in issue, was *per se* unconstitutional, it would have said so, instead of leaving the question open by basing the unconstitutionality on the application of the tax and inviting the States to try again and see if they could not frame a properly limited law. New York has accepted the invitation. Congress, on the other hand, declined to take charge of the subject, and the reasons why it should not, will, for the first time, be presented to this Court *post;* showing that any "national" system of inspection laws and imposts would be inadequate and inequitable in not adapting itself to varying local needs, nor the varying rate of *per capita* expenses for different ports. Besides, there is a large field of discretion in the State. Some States may say we want paupers if they are able-bodied. Our citizens want orphan boys and girls. It is for this reason the New York laws leave this to the discretion of the Commissioners of Emigration. It may be well to remark, in parenthesis, that it is this discretion which caused Mr. Justice Blatchford to decide that the Inspection Law contained provisions not germane to the object. But the learned Justice did not consider that these were mere incidental alternative provisions, and not part of the "execution of the inspection," and therefore the tax had no application to them.

(*g*) As to the Henderson opinion there is but one declaration in it which logically turns towards the defense, and that is where the learned Justice questions the doctrine of Cooley vs. Board of Wardens as to there being a local field for State regulation of commerce until the action of Congress, and says that such doctrine has never been asserted without dissent. But it appears that this doctrine, and Cooley vs. Board of Port Wardens

in particular, was unanimously affirmed only four years before in *ex-parte* McNeil quoted *supra*, and so the learned Justice in a later case, where that question was really in issue, says in delivering the unanimous opinion of the Court (Pound vs. Turck 95 U. S., 462): "The principle established by the decisions is "that in regard to the powers conferred by the commerce clause "of the constitution, there are some which by their essential "nature are exclusive in Congress; while there are others which "from their nature may be exercised by the States until Con-"gress shall see proper to cover the same ground" (citing Cooley vs. Board of Wardens)—"*though the doctrine has been occasionally questioned.*"

(*h*) The very multiplication of the grounds of unconstitutionality of the head-moneys *ante* only shows the more clearly their inapplication to the present impost. First, if passengers are *imports*, then the impost for their "*inspection*" is expressly maintained by the constitution; secondly, it is plainly no violation of the naturalization laws; thirdly, the impost on the importer having for its sole "*purpose and effect*" to make him pay the expense of excluding paupers and others who ought to be excluded, is no violation of treaties for the free intercourse of rightful immigrants, nor of the right of Congress to regulate such intercourse; neither is it an impost of a national character requiring uniformity throughout the United States, any more than any other inspection impost. It is plain that if this inspection impost violated said treaties at all, it would still do so even if imposed by Congress, which is contrary to the whole argument of the defense.

That the clause in the French treaty, "Commerce between the parties shall be free," did not mean to exempt *persons* from otherwise lawful charges, is shown by its being applied equally to goods and persons, with a provision against any higher duties or charges than as to "the most favored nation." The same is true of all the treaties. The term "*free*" meant free from embargo or prohibition.

The distinction here maintained is like that established by this Court in the wharfage cases. A charge for the mere privilege of landing vessels in New Orleans was a void tonnage tax, however levied. It was also in violation of the treaties for free navigation of the Mississippi. But an ordinance charging $7\frac{1}{2}$ cents per ton for each vessel on every landing to maintain the

wharfage system of St. Louis, including cost of docks, supervising landing, loading, &c., was held recently in the *Packet Co. vs. St. Louis* to be a constitutional levy to defray expenses for necessary service, although the service was in part compulsorily received (100 U. S., 459, 462–4).

The object and application of the charge determined its character. There the Court say as to treaties for free navigation, &c., that "if the ordinance is not in conflict with the Federal Constitution, there will be no ground whatever for holding that it was inconsistent with either of the treaties referred to."

(*h*) It will now be seen that the present defense, while professing to rest on the *Passenger* and *Henderson* cases, presents none of the bases of those decisions. Indeed, the whole argument here reduces to this: That a *per capita* impost should not be levied on the importation to defray the expenses of the State; because it is said that would make a rich immigrant pay for a pauper. This virtually admits that the *importer* is liable for the expense; and this, indeed, has never been questioned.

The importer was obliged to give a general indemnity bond in the old law, whose constitutionality was affirmed in New York vs. Miln in 1837 (11 Pet.), without the learned counsel ever presuming to question this provision. The *Henderson Case* does not question it; it simply says that to exact an impossible indemnity bond for every separate person as the only alternative for paying the old unconstitutional tax was a mere evasion renewing the old tax by indirection.

Now, as there is no question that the importer is liable to refund the expenses incurred by the State, it follows that he is liable to pay them as they are incurred, *or the State would have to advance money for the importer.* Therefore, there can be no objection to the tax exacting the money on the landing of the immigrants, if it is not excessive.

Therefore, the only question really raised by the defense is: Can the aggregate expenses for which the importers are liable be collected from the importers by a *per capita* average tax on the importation.

It has been falsely assumed and with great effect below that the inspection expenses were necessarily less per immigrant for a vessel carrying only first class passengers than for one with steerage. On the contrary, the former bring so few aliens that

the bare expense of boarding the vessel and examining the passengers may more than cover the ten or twenty dollars collected.

It is certain that if the importer is liable to pay the inspection charges he cannot render them unconstitutional by any action of his in charging them over on passengers. If he has not a legal right to distribute them *per capita* among the passengers he must not do it. The State does not authorize it.

The futility of this defense will be further shown by its application to other inspection imposts and wharfage and pilotage charges.

II. This inspection-impost is sustained by the rulings holding that other inspection imposts and quarantine, pilotage and wharfage charges do not infringe the commercial power of Congress. Wharfage and inspection have received sufficient preliminary discussion.

A. QUARANTINE LAWS.—The present laws literally embrace quarantine laws, and it is impossible to draw any line of distinction in principle between these portions of the Inspection Laws admitted to be constitutional, and the other portions contested. The quarantine portions inspect persons and their effects to ascertain who and what are affected with contagious diseases, and make the importer pay the expense of excluding those unable to pay for themselves until they are cured, or of sending them back if they had an incurable plague like the leprosy. The other portions of the statute deal in like manner with the moral leprosy of "habitual" crime, or the incurable malady of imbecile pauperism.

B. PILOTAGE. Pilotage is apportioned either to the tonnage or the draft of vessels by arbitrary rules widely differing and showing a large field of discretion in the State reviewable only by Congress. Vessels are compelled to take pilots although their own may be even more competent, and, even where they are allowed to dispense with them they are charged half pilotage for no service at all, just to sustain the pilot system. These charges were sustained in the late case of *ex parte* McNeil (13 Wall., 236, 238, 240), whilst saying: "It must be admitted that pilot regula-"tions are regulations of commerce. A pilot is as much a part "of the commercial marine as the hull of a ship and the helm "by which it is guided." "But conceding that this provision "is a regulation of commerce, and within the power of Con-

"gress, it by no means follows that it involves the constitu-
"tional conflict insisted upon." Now, pilotage charges are averaged per ton or per foot of draft, although that is but a distant approximation to the cost of piloting any particular vessel, or the value of the service rendered to that vessel. Here, on the contrary, the tax is as close an approximation as possible. Manifestly the present inspection law and impost come within the same principle of constitutionality as pilot laws and charges, whether they are regulations of commerce or not.

POINTS.

I. That the Inspection Law is a valid exercise of the power conferred upon the State by the Constitution of the United States has not been an open question in this Court for half a century. The full context of the law is as follows:

CHAPTER 427.

AN ACT for the inspection of Alien Emigrants and their effects by the Commissioners of Emigration.

Passed May 28, 1881; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. *The Commissioners of Emigration* are hereby empowered and directed to inspect the persons and effects of all persons arriving by vessel at the Port of New York from any foreign country, as far as may be necessary, to ascertain who among them are habitual criminals, or pauper lunatics, idiots or imbeciles, or deaf, dumb, blind, infirm, or orphan persons without means or capacity to support themselves, and subject to become a public charge, and whether their persons or effects are affected with any infectious or contagious disease, and whether their effects contain any criminal implements or contrivances.

SECTION 2. On discovering any such objectionable persons or effects, the said the Commissioners of Emigration and its inspectors are further empowered to take such persons into their care or custody, and to detain or destroy such effects, it neces-

sary for the public welfare, and keep such persons under proper treatment, and provide for their transportation and support as long as they may be a necessary public charge.

The Commissioners of Emigration shall in case of habitual criminals, and may in other cases where necessary to prevent such persons from continuing a public charge, re-transport such person or persons to the foreign port from which they came.

SECTION 3. *The Commissioners of Emigration* are further empowered to board any incoming vessel from foreign ports arriving at the Port of New York, by its agents and inspectors, who shall have such powers as may be necessary to the effectual execution of this Act, and any person who shall resist them in the execution of their lawful function shall be guilty of a misdemeanor, and may be arrested by the officer resisted, and upon conviction may be sentenced to a term not exceeding six months in the penitentiary, or to pay a fine of one hundred dollars, or both.

SECTION 4. This Act shall take effect immediately.

The power of the State to enact and enforce such laws as this one, has been uniformly upheld by this Court.

That alien immigrants are proper subjects for inspection is equally clear.

"The States may meet such persons (paupers, vagabonds, "suspected persons and fugitives from justice) upon their ar- "rival in port, and may put them under all proper restraints" (7 How. U. S., p. 426). But how can the State *meet* SUCH persons on their arrival save by inspecting *all* immigrants, to ascertain who among them come within the prohibited classes? "This right—to repel from its shores lunatics, idiots, criminals "or paupers, * * * —has its foundation in the sacred law "of self defence, which no power granted to Congress can re- "strain or annul" (7 How. U. S., 457(.

IMPOSTS TO PAY FOR INSPECTION.

And to pay the expenses of such inspection the State may "exact from the owners or consignees of a quarantined vessel, "and from the passengers on board of her, *such fees* as will pay "to the State the cost of their detention, and of the purification "of the vessel, cargo and apparel of the persons on board" (7 How., 414).

This citation refers to but *one* of the subjects creating the necessity for inspection, enumerated as "diseased persons, pau-
" pers, vagabonds, suspected persons and fugitives from justice,
" who might corrupt the morals or endanger the health or lives
" of their citizens" (7 How., 400).

" But, I have said the States have the right to turn off
" paupers, vagabonds and fugitives from justice, and the States
" where slaves are have a constitutional right to exclude all
" such as are, from a common ancestry and country, of the
" same class of men. And when Congress shall legislate—if it
" be not disrespectful for one who is a member of the judiciary
" to suppose so absurd a thing of another department of the
" government—to make paupers, vagabonds, suspected persons,
" and fugitives from justice, subjects of admission into the
" United States, I do not doubt it will be found and declared,
" should it ever become a matter for judicial decision, that such
" persons are not within the regulating power which the United
" States have over commerce. Paupers, vagabonds, and fugi-
" tives never have been subjects of rightful national intercourse,
" or of commercial regulations, except in the transportation of
" them to distant colonies, to get rid of them, or for punishment
" as convicts. They have no rights of international intercourse;
" no one has a right to transport them, without authority of
" law, from where they are to any other place, and their only
" rights where they may be, are such as the law gives to all
" men who have not altogether forfeited its protection.

" The States may meet such persons upon their arrival in
" port and may put them under all proper restraints. They
" may prevent them from entering their territories, and may
" carry them out or drive them off " (7 How., 426).

" This right of the States * to repel from her shores luna-
" tics, idiots, criminals or paupers, which any foreign country,
" or even one of her sister States, might endeavor to thrust
" upon her, * has its foundation in the sacred law of self-
" defense, which no power granted to Congress can restrain or
" annul. It is admitted by all that those powers which relate to
" merely municipal legislation, or what may be more properly
" termed internal police, are not surrendered or restrained; and
" that it is as competent and necessary for a State to provide
" precautionary measures against the moral pestilence of
" paupers, vagabonds and convicts as it is to guard against the

"physical pestilence which may arise from unsound and in-
"fectious articles imported" (Id., 457).

The Chief Justice says: "The right of the State to protect
"itself against the burthen of supporting those who come to us
"from European almhouses seems to be conceded in the argu-
"ment" (Id., 469).

"*Conceded*" by Daniel Webster and Rufus Choate.

"In giving the commercial power to Congress, the States did
"not part with that power of self-preservation which must be
"inherent in every organized community. *They may guard*
"*against the introduction of anything which may corrupt the*
"*morals or endanger the health or lives of their citizens.*
"Quarantine or health laws have been passed by the States,
"and regulations of police for their protection and welfare.

"The inspection laws of a State apply chiefly to exports, and
"the State *may* lay duties and imposts on *imports* or exports to
"pay the expense of executing those laws. But a State is
"limited to what shall be 'absolutely necessary' for that pur-
"pose; and still further to guard against the abuse of this
"power, it is declared that 'the net produce of all duties and
"'imposts laid by a State on imports or exports shall be for
"'the use of the Treasury of the United States; and all such
"'laws shall be subject to the revision and control of Con-
"'gress'" (7 How., 400, 401).

In the matter of Ah Fong, 13 Am. Law Reg., 767, Mr. Justice Field says (S. C., 3 Sawyer, 145): "It is equally true that the
"police powers of the State may be exercised by precautionary
"measures against the increase of crime or pauperism, or the
"spread of infectious diseases from persons coming from other
"countries; that the State may entirely exclude convicts,
"lepers, and persons afflicted with incurable disease; may refuse
"admission to paupers, idiots and lunatics, and others who from
"physical causes are likely to become a charge upon the public,
"until security is afforded that they will not become such
"charge, and may isolate the temporarily diseased until the
"danger of contagion is gone. The legality of precautionary
"measures of this kind has never been doubted. The right of
"the State in this respect has its foundation, as observed by
"Mr. Justice Grier in the passenger cases, in the sacred law of
"self-defence, which no powers granted to Congress can restrain
"or annul."

"What may be done by a State to protect itself from the "influx of paupers and convicted criminals in the absence "of legislation by Congress is left undecided; Henderson vs. "The Mayor of New York *et al.*, 92 U. S., 260."

Machine Co. vs. Gage, 100 U. S., 679.

"So may the States by like regulations exclude from their "midst not only convicts, paupers, idiots, lunatics and persons "liable to become a public charge, but animals having con-"tagious diseases" (Railroad Co. vs. Husen).

Patterson vs. Kentucky, 97 U. S., 506.

"That the power to establish quarantine laws rests with "the States, and has not been surrendered to the general "government is settled in Gibbons vs. Ogden. The source "of this power is the acknowledged right of a State to pro-"vide for the health of its people, and although this power "when set in motion may, in a greater or less degree, "affect commerce, yet the laws passed in the exercise of "this power are not enacted for such an object. They are "enacted for the sole purpose of relieving the public health, "and if they injuriously affect commerce, Congress, under the "power to regulate it, may control them. Of necessity they "operate on vessels engaged in commerce, and may produce "delay or inconvenience, but they are still lawful when not "opposed to any constitutional provision, or any Act of Con-"gress on the subject.

II. *The inspection impost is valid, being raised to execute a constitutional law.*

"It is evident that the power to establish quarantine regula-"tions cannot be executed without the State possesses the "means to raise a revenue for their enforcement."

Peete vs. Morgan, 19 Wal., 582.

CHAPTER 432.

AN ACT to raise money for the execution of the Inspection Laws of the State of New York.

Passed May 31st, 1881; three-fifths being present.

The people of the State of New York represented in Senate and Assembly do enact as follows:

SECTION 1. There shall be levied and collected a duty of One

Dollar for each and every alien passenger who shall come by vessel from a foreign port to the Port of New York for whom a tax has not heretofore been paid—the same to be paid to the Chamberlain of the City of New York by the master, owner, agent or consignee of every such vessel within twenty-four hours after the entry thereof into the Port of New York.

SECTION 2. It shall be the duty of the master or acting master of every such vessel within twenty-four hours after its arrival at the Port of New York to report under oath to the Mayor of the City of New York the names, ages, sex, place of birth and citizenship of each and every passenger on such vessel, and in default of such report every passenger shall be presumed to be an alien arriving at the Port of New York for the first time. And in default of every such payment to the Chamberlain of the City of New York there shall be levied and collected of the master, owner, agent or consignee of every such vessel, a penalty of twenty-five cents for each and every alien passenger in addition to the duty heretofore imposed.

SECTION 3. It shall be the duty of the Chamberlain of the City of New York to pay over from time to time to the Commissioners of Emigration all such sums of money as may be necessary for the execution of the Inspection Laws of the State of New York, with the execution of which the Commissioners of Emigration now are or may hereafter be charged by law; and to take the vouchers of the Commissioners of Emigration for all such payments.

And it shall be the duty of the said Chamberlain to pay over annually on the first of January in each year to the Treasury of the United States the net produce of all the duties collected and received by him under this Act after the payments to the Commissioners of Emigration aforesaid, and take the receipt of the Secretary of the Treasury therefor.

SECTION 4. The Commissioners of Emigration shall institute suits in the name of the People of the State of New York for the collection of all moneys due or which may grow due under this Act, the same to be paid when collected to the Chamberlain of the City of New York to be applied by him pursuant to the terms of this Act.

SECTION 5. Section 1 shall not apply to any passenger whose passage ticket was actually issued and paid for prior to the time this Act takes effect, but every ticket shall be presumed to have

been issued after this Act takes effect in the absence of evidence showing the contrary.

SECTION 6. This Act shall take effect immediately.

INSPECTION LAW.

That the law of New York is for the inspection of immigrants is beyond cavil. It is objected to it, that because in 1787 immigration brought no serious evils in its train, requiring protection to the citizen of the State, that, therefore, the Constitution was limited to the needs of that period, is not adapted to and was not intended by its framers to be adjustable to the growth of the country; that in 1881, the transportation to and entry at the port of New York of five hundred thousand immigrants an immense city of people, containing a larger percentage of paupers, idiots, lunatics, and diseased persons, requiring immediate public support, care and supervision, than the City of New York, which spends its millions annually upon its hospitals, asylums, and police, demonstrating the absolute necessity of a law for the inspection of immigrants, yet, that the absence of that necessity a century ago, renders the inspection law of to-day not only unconstitutional, but absolutely prevents it from being an inspection law at all. The object of inspecting exports was to keep up the standard of the commerce of the home port. The object of inspecting imports is to protect the commonwealth against the introduction of whatever is constitutioally objectionable. To keep out bad coffee or adulterated tea or diseased cattle cannot be so important to the body politic as the exclusion of convicts, paupers, idiots, lunatics, and diseased persons. The method by which this is done in each case may vary, but the object of the inspection in each case is the same.

It is objected, however, that the law does not *compel* the Commissioners of Emigration to re-transport all paupers and persons affected with contagious diseases. There are several conclusive answers to this:

FIRST. The application of the tax is explicitly limited to what is "*necessary for the execution* of the (said) Inspection Laws," so that giving the Commissioners a discretion *not to execute* the inspection can not make the tax apply to anything outside of such execution.

SECONDLY. The Commissioners are only authorized to retain any persons "*as long as they may be a necessary public charge.*"

This *may* and therefore *must*, if necessary to the constitutionality of the law, be construed as meaning that the Commissioners are not authorized to retain them any longer than is necessary to re-transport them, unless otherwise disposed of in the meantime, or unless unable to stand the voyage. They cease to be a "*necessary public charge*," after the necessary time of retention has elapsed; but this time may extend several days or weeks in case of disease, &c., and may eventuate in their being admitted to the community instead of permanently excluded from it. This shows that the discretion as to re-transporting persons is a necessary provision, and does not enlarge the limitation to necessary expenses of executing the inspection.

THIRDLY. If the law *permits* the Commissioners to retain persons longer than is "*necessary for the execution of the inspection*," the expense of such *extra* retention is incurred not in the *execution* of the Inspection Law, but of other laws with which the Commissioners are charged, and for whose execution the State pays out of its own treasury.

FOURTHLY. The constitutional limitation on the discretion, if any, reposed in the Commissioners, is just as binding on the application of the tax, whether expressed in the law or not. The law can add nothing to the force of the Constitution, and does not conflict therewith *unless it applies, or requires the tax to be applied contrary thereto.*

The inspection of passengers or cattle, is not a new idea. In Henderson *vs.* The Mayor, 92 U. S., 275, this Court said:

"The portions of the New York statute which concern *persons* who, on *inspection*, are found to belong to these classes, are not properly before us."

In Chy Lung *vs.* Freeman, 92 U. S., 280, it is said:

"When a State statute, limited to provisions necessary and appropriate to that object only, shall, in a proper controversy, come before us, it will be time enough to decide that question."

"While for purposes of self-protection, it may establish "quarantine and reasonable *inspection* laws, it may not interfere with transportation into or through a State, beyond what "is absolutely necessary for its self protection."

Railroad Co. *vs.* Husen, 95 U. S., 472.

Again, speaking of the Henderson and Chy Lung cases, this Court said: "They deny the validity to any State legislation, "professing to be an exercise of police power for the protection "of evils from abroad, which is beyond the necessity for its "exercise, wherever it interferes with the rights and powers "of the Federal Government.

"Tried by this rule, the statute of Missouri is a plain intru- "sion upon the exclusive domain of Congress. It is not a quar- "antine law. It is not an *inspection* law. It says to all natural "persons and to all transportation companies: 'You shall not "'bring into the State any Texas cattle or any Mexican cattle or "'any Indian cattle between March 1st and December 1st in "'any year, no matter whether they are free from disease or "'not.'"

Same citation.

Again with reference to pilotage the Court say:

"The Act of [Congress of] 1789 contains a clear and authorita- "tive declaration that the nature of this subject is such that "until Congress should find it necessary to exert its power it "should be left to the legislation of the States."

Cooley vs. Board of Wardens, 12 How., 319.

This clear and authoritative declaration by this Court that the legitimate effect of an act of Congress in reference to commerce determines what are and what are not subjects requiring a uniform rule must obtain universal acquiescence, otherwise a conflict would arise between Congress and the Executive on the one hand with full power to inquire into and determine as matters of fact, what subjects of commerce are best left to local rules and regulations, and the Supreme Court on the other hand forced to determine as an abstract proposition of law upon demurrer, barren of any fact or evidence that in its judgment a uniform rule is required; thus will Congress, upon whom the regulation of commerce is conferred, be stripped of its control of commerce.

In reference to the tax upon "the migration or importation" of persons it was admitted in the constitutional debates that the tax was upon men as if they were property, and yet that the clause included "freemen" as well as slaves.

Col. Mason said it was necessary in case of "*convicts*" in order to prevent the introduction of them.

5 Ell. Deb., Supp., p. 478.

Chapter 141, U. S. Laws of 1875, Vol. 18, p. 477, entitled "An Act supplementary to the acts in relation to immigration," makes the involuntary importation of persons from China and Japan, for the purpose of holding them to a term of service, unlawful, and declares all contracts for a term of service "made in advance, or in pursuance of such *illegal importation*," void.

"Section 3. That the *importation* into the United States "of women for the purposes of prostitution is hereby forbid-"den."

Section 5 prohibits the immigration of aliens who are undergoing sentence for felonious crimes other than political offenses, or whose sentence has been remitted on condition of emigration, and women "*imported* for the purposes of prostitution."

Every vessel may be *inspected* if there be reason to suspect that such criminals or lewd women are on board.

"The officer making such inspection," &c., designating the person ascertained by him to be of either of the classes where "*importation* is hereby forbidden," the alien shall not leave the vessel until such "inspection" is had.

"Any alien certified to by the inspecting officer," &c.

III. The right of a State to enact a law carries with it the power to raise a revenue by taxation for its execution.

"It is evident that the power to establish quarantine regula-"tions cannot be executed without the State possesses the "means to raise a revenue for their enforcement."

Peete vs. Morgan, *supra*.

That is, the revenue must be raised out of the property and persons quarantined, and such has been the uniform practice. This does not refer to the general taxing power of the State, but to that just and equitable adjustment of the burdens to the benefits.

Inspection fees have uniformly been imposed on the articles

inspected; not from the condemned alone, but, by a uniform rule, from all.

" Although many of the powers formerly exercised by the " States are transferred to the Government of the Union, yet " the State Governments remain and constitute a most impor- " tant part of our system. The power of taxation is indispensa- " ble to their existence, and is a power which is capable of re- " siding in and being exercised by different authorities at the " same time. We are accustomed to see it placed, for different " purposes, in different hands, * * * * and a power in one " to take what is necessary for certain purposes is not in its " nature incompatible with a power in another to take what is " necessary for other purposes."

Gibbons vs. Ogden, 9 Wheat., 198-9.

IV. The right to enact the inspection law and the power to raise a revenue for its execution being established, the next question is, Has that power been lawfully exercised?

That either the carrier or the immigrant should pay cannot be denied without denying the power to tax.

That the power to tax is no part of the power to regulate commerce is *stare decisis* here.

" Opposed as that theory is to the settled rule of construc- " tion that the commercial clause of the Constitution neither " confers, regulates nor prohibits taxation, it is not deemed " necessary to give the theory much further consideration. " Gibbons *vs.* Ogden, *supra.*"

Transportation Co. vs. Wheeling, 99 U. S., 285.

In Gibbons vs. Ogden, 9 Wheaton, MARSHALL, C. J., said:

" Congress is authorized to lay and collect taxes, &c., to pay " the debts, and provide for the common defense and general " welfare of the United States. This does not interfere with the " power of the States to tax for the support of their own gov- " ernments; Congress is not empowered to tax for those pur- " poses which are within the exclusive province of the States. " When then each government exercises the power of taxation, " neither is exercising the power of the other (p. 199).

"There is no analogy then between the power of taxation and " the power of regulating commerce" (p. 200).

" We must first determine whether the act of laying *duties* " *or imposts on imports or exports* is considered in the Constitu-

" tion as a branch of the taxing power or of the power to regu-
" late commerce. We think it very clear that it is considered
" as a branch of the taxing power. It is so treated in the first
" clause of the 8th section. ' *Congress shall have power to lay*
" ' *and collect taxes, duties, imposts and excises;*' and, before
" commerce is mentioned, the rule by which the exercise of this
" power must be governed is declared. It is that all duties, im-
" posts and excises must be uniform. In a separate clause of
" the enumeration the power to regulate commerce is given as
" being entirely distinct from the right to levy taxes and im-
" posts, and as being a power not before conferred. The Con-
" stitution, then, considers these powers as substantive and
" distinct from each other.

" The power to levy taxes could never be considered as
" abridging the right of the States on that subject; AND THEY
" MIGHT, CONSEQUENTLY, HAVE EXERCISED IT BY LEVYING DUTIES
" ON IMPORTS OR EXPORTS, HAD THE CONSTITUTION CONTAINED NO
" PROHIBITION ON THIS SUBJECT.

" This prohibition, then, is an exception from the acknowl-
" edged power of the States to levy taxes, not from the ques-
" tionable power to regulate commerce. * * * *

" But the inspection laws are said to be regulations of com-
" merce, and are certainly recognized in the Constitution as
" being passed in the exercise of a power remaining with the
" States. That inspection laws may have a remote and con-
" siderable influence on commerce, will not be denied, but that
" a power to regulate commerce is the source from which the
" right to pass them is derived cannot be admitted " (*Id.*, 203).

Again, Mr. Justice Johnson says, in the same case:

" The same bale of goods, the same cask of provisions, or
" the same ship, that may be the subject of commercial regula-
" tions, may also be the vehicle of disease. And the health
" laws that require them to be stopped and ventilated, are no
" more intended as regulations on commerce than laws which
" permit their importation are intended to inoculate the com-
" munity with disease. Their different purposes mark the dis-
" tinction between the powers; and while frankly exercised they
" can produce no serious collision. * * *

" Inspection laws are of a more equivocal nature, and it is
" obvious that the Constitution has viewed that subject with
" much solicitude. But, so far from sustaining an inference in

" favor of the power of the States over commerce, I cannot but " think that the guarded provisions of the 10th Section on this " subject furnish a strong argument against that inference. It " was obvious that inspection laws must combine municipal " with commercial regulations; *and while the power over the sub-* " *ject is yielded to the States*, for obvious reasons an absolute " control is given over State legislation on the subject, as far as " that legislation may be exercised so as to affect the commerce " of the country."

Gibbons vs. Ogden, 9 Wheat., pp. 235–6.

" That the commercial clause does not apply to the right of " taxation in either sovereignty, the taxing power being a dis- " tinct and separate power from the power to regulate com- " merce; and that the right of taxation in the State remains " over every subject where it before existed, with the excep- " tion only of those expressly or impliedly prohibited.

" Neither imposts nor duties on imports or exports can be " levied by a State, except what may be absolutely necessary for " executing its inspection laws; nor can a State levy any duty " on tonnage without the consent of Congress."

Transportation Co. vs. Wheeling, 99 U. S. 280.

In Cooley's Constitutional Limitations (3 Edit.), p. *584, that eminent jurist says:

" Numerous other illustrations might be given of the power " in the States to make regulations affecting commerce, which " are sustainable as regulations of police. Among these, quar- " antine regulations and health laws of every description will " readily suggest themselves, and these are, or may be some- " times, carried to the extent of ordering the destruction of pri- " vate property when infected with disease or otherwise danger- " ous. These regulations have generally passed unchallenged. " The right to pass inspection laws and to levy duties, so far as " may be necessary to render them effectual, is also undoubted, " and is expressly recognized by the Constitution.

* * * * * *Id.*, *586.

" Moreover, the regulations of commerce are usually, and in " some cases must be, general and uniform for the whole coun- " try; while, in some localities, State and local policy will de-

"mand peculiar regulations with reference to special and "peculiar circumstances."

Therefore, we repeat that the law for whose execution the impost was levied, not being a regulation of commerce, the impost is not either.

V. The exercise of the power of taxation by the States not being a regulation of commerce, and not being prohibited to the States, except upon imports and exports, the State inspection impost is valid unless the passengers are imports not subject to inspection.

VI. But it is claimed by the defendants and held by the Court below that though the immigrant may be inspected and the habitual criminals and paupers, etc., may be excluded by the State on the one hand—and that although immigrants are not imports, and are not, therefore, within the constitutional inhibition of State taxation on the other—that the two separately allowable acts of the State being exercised together make a regulation of commerce by the State. Conceding this to be true, for the sake of argument, how is it therefore an unlawful regulation of commerce? This Court has held: 1st. "That the grant of the commercial "power to Congress does not contain any terms which ex- "pressly exclude the States from exercising authority over its "subject matter—if it were admitted that the existence of this "power in Congress, like the power of taxation, is compatible "with the existence of a similar power in the States, then it "would be in conformity with the contemporary exposition of "the Constitution (Federalist No, 32) and with the judicial con- "struction given from time to time by this Court after the most "deliberate consideration to hold that the mere grant of such a "power to Congress, did not imply a prohibition on the States "to exercise the same power, that it is not the mere existence "of such a power but its exercise by Congress which may be "incompatible with the exercise of the same power by the "States, and the States may legislate in the absence of Con- "gressional regulations." (Sturges vs. Crowninshield, 4 Wheaton, 193; Moore vs. Houston, 5 Wheaton, 1; Wilson vs. Blackbird Creek Co., 2 Peters, 251.)

Cooley vs. Board of Wardens, 12 How., 317–8.

2d. "The uniformity of commercial regulations, which the

"grant to Congress was designed to secure against conflicting "State provisions, was necessarily only intended for cases where "such uniformity is practicable; when from the nature of the "subject or the sphere of its operations is local and limited, "special regulations adapted to the immediate locality could "only have been contemplated. State action upon such sub- "jects can constitute no interference with the commercial "power of Congress, for when that acts the State authority is "superseded. Inaction of Congress upon these subjects of a "local nature or operation, unlike its inaction upon matters "affecting all the States and requiring uniformity of regulation, "is not to be taken as a declaration that nothing shall be done "with respect to them, but is rather to be deemed a declaration "that for the time being, and until it sees fit to act they may be "regulated by State authority."

County of Mobile v. Kimball, 102 U. S., 698.

3d. "That the object of making the grant of the power over "commerce to Congress was to prevent discriminating State "legislation, and thereby secure advantages to the products and "citizens of one State over those of another, as there would "otherwise be no security against conflicting regulations of dif- "ferent States, each discriminating in favor of its own products "and citizens against the products and citizens of other "States. And it is a matter of public history that the object of "vesting in Congress the power to regulate commerce with for- "eign nations and among the States was to insure uniformity of "regulation against conflicting and discriminating State legis- "lation (County of Mobile vs. Kimball, 102 U. S., 698); that the "object of vesting this power in the general government was to "insure this uniformity against discriminating State legisla- "tion."

Tiernan vs. Rinker, 102 U. S., 126.

4th. That the exclusive power of Congress over commerce was confined to that which was created with the Government of the United States or would admit only of one uniform system.

"Whatever subjects of this power are in their nature "national, or admit only of one uniform system or plan of "regulation, may justly be said to be of such a plan or nature "as to require exclusive legislation by Congress. That this

" cannot be affirmed of laws for the regulation of pilots and " pilotage is plain."

Cooley vs. Bd. of Wardens, 12 How., 319.
License cases, 5 How., 583.

And also that as the pilotage laws of Pennsylvania did not pass the appropriate limits for the regulation of pilotage it was not a tax upon tonnage.

12 How., 314.

5th. That a State tax upon any part of the operations of commerce was not a State discrimination in favor of its own ports or commerce, but an objection thereto, and not within the evil sought to be remedied.

As to the impost: "It is an objection to and not a ground of " preference of a port that a charge of this kind must be borne " by vessels entering it; and accordingly the interests of a port " require, and generally produce such alleviations of these " charges as its growing commerce from time to time renders " consistent with the general policy of the pilot laws."

Cooley vs. Bd. of Wardens, 12 How., 315.

6th. That "it is for Congress to determine when its full " power shall be brought into activity, and the regulations and " sanctions which shall be provided."

Gilman vs. Philadelphia, 3 Wall., 725.

7th. That the local authorities are the best judges of local wants, and their judgment is entitled to great weight in determining how they can best be provided for.

"These are police regulations in aid and furtherance of com- " merce enacted by local authorities, who have knowledge of " the wants of the locality, and a deep interest in properly pro- " viding for them."

Steamboat New York vs. Rea, 18 How., 226.
Owners of brig James Gray vs. Owners ship John Fraser, 21 How., 187.

VII. This Court has decided that various State laws affecting or regulating commerce are valid; compulsory pilotage fees.

Cooley vs. Bd. of Wardens, *supra.*

Closing navigable creeks.

Wilson vs. Blackbird Creek Co., 2 Pet., 251.

Quarantine laws.
Gibbons vs. Odgen, *supra.*
Peete vs. Morgan, *supra.*

VIII. Seventy-five per cent. of the total immigration by vessel to the United States enters the port of New York the other twenty-five per cent. is nearly equally divided between Boston, Philadelphia and Baltimore. It is said that the inspection of immigrants to ascertain who among them are habitual criminals, paupers, &c., and the necessary fee therefor must be uniform throughout the United States. That at the ports of Charleston, Savannah, New Orleans, Galveston and Norfolk, where the immigration is counted by units and where the States would willingly pay a bounty to obtain immigrants, a system uniform in regulation and in expense must be established. If there be any uniformity required by the Constitution it is of the tax because the States may vary the regulations as to criminals, paupers, &c., *ad libitum*, it is a part of their sacred law of self defense, and we are reduced to the absurdity of having a uniform tax to enforce as many varying laws as there are States to enact them or that the sacred right of self defense does not as a matter of fact exist in the States, or that the partial exercise of the power by Congress results in a total suspension of power in the States.

It is said in the same breath that the inspection of immigrants with a view to the exclusion of the obnoxious persons specified exists in the States as a part their sacred law of self defense and that it is regulation of commerce requiring a uniform rule confided exclusively to Congress. That the State may enact and enforce the law and that it cannot enforce the law by reason of its inability to impose the tax.

If the tax is for a legitimate purpose the power to levy it is established; only the method of levy remains to be considered.

IX. That congress cannot levy a tax to enable a State to enforce one of the State's laws is plain.

That the State has power to levy the tax in some manner is unquestioned.

That a tax upon the carrier, who makes the profit by carrying the immigrant requiring the inspection and care or exclusion, is equitable, indeed the most equitable that can be devised, is self-evident.

That each immigrant must be inspected in order to ascertain who among them are paupers, &c., and that therefore each immigrant is the cause of some expense to the State is patent.

Against all these positions it is urged that while as a matter of law the tax is imposed upon the carriers, as matter of fact the immigrant pays it, and that therefore, well-to-do French immigrants may pay for the Irish pauper. The force of this is not perceived. Each immigrant is entitled to the same rights and subject to the same restrictions.

It would be a novel feature in the law to make its validity depend upon the equality of benefit which citizens differently situated had obtained as matter of fact rather than as matter of law. That kind of equality depends not upon the law, but upon the varying circumstances of the individual.

Could a federal tax law exactly equalize the benefits to the immigrants?

Is it possible to be done?

This principle of equality in fact as distinguished from equality in law has been distinctly repudiated in this court? Kelly vs. Pittsburg, 104 U. S., 78.

But the proposition is not true as matter of fact or law; the immigrant does not pay the tax. If he did the steamship companies would not defend. Whether or not the immigrant pays the tax depends upon the law of supply and demand, the number of steamers engaged in the traffic and the number of immigrants—whether there is competition and cutting of rates or combination and pooling of profits. Through-tickets are sold from various points of Europe to Chicago, Ills., via New York over the New York Central Railroad, over the Erie Railroad, over the Atlantic and Great Western, ever the Pennsylvania Central, over the Baltimore and Ohio, also via Boston, Philadelphia and Baltimore, making a multitude of combinatious of competing lines of which the steamer voyage is but a link in the chain of travel; to boldly assert as a fact without evidence that

the immigrant pays the tax is to establish one's ignorance of the laws of trade. It cannot be proven as a fact without evidence.

X. But assuming the immigrant to be taxed, it is lawful, and Congress has directly authorized, sanctioned and regulated it. The State tax must be *equally* imposed upon *every person* immigrating to the State from a foreign country.

"No tax or charge shall be imposed or enforced by any State "upon any person immigrating thereto from a foreign country "which is not equally imposed and enforced upon every person "immigrating to such State from any other foreign country." (R. S., Section 2104.)

Defendant asks that the State shall violate the rule of uniformity prescribed by Congress to "equally impose and enforce "upon *every* person immigrating to such State" a uniform tax. There is not only a prescription of *uniform* taxation upon every person but a recognition by Congress of the right of the States to levy an impost on immigrants, for their inspection. It has long been settled that the States had no power to levy a general tax upon immigrants. Here, also, was the assertion of the Congressional power to control such tax as prescribed by the Constitution with respect to inspection imposts. See also original act, vol. 16, U. S. S. at large, page 144.

XI. The defendant's impossible proposition to tax only the paupers, idiots and lunatics, the diseased and the habitual criminals is not only directly contrary to the decision of the Court in the Chy Lung case, where the provision of the California Statute, leaving it to the arbitrary discretion of the officer to designate the persons for whom the vessel should be liable was condemned, but it is wholly impracticable and incapable of execution.

The tax cannot be collected from the pauper. The carrier sells passage tickets at a uniform rate and if the immigrant pays the tax he pays it when he buys his ticket. The carrier cannot or will not inform himself in advance of selling tickets through various agencies scattered over Europe, who of the holders thereof on arrival at New York, will upon inspection prove to

belong to the obnoxious classes. It follows that it is impossible for him to collect the tax from those classes.

An attempt to accomplish this by making the carrier pay for obnoxious persons a sum sufficient to pay for necessary inspection would simply result in the carrier apportioning the tax equally among the immigrants by averaging the amount required.

The inspection fee of one dollar for each alien immigrant is but the measure of the tax required to support the expense, and is in exact ratio with the increase and decrease of immigration. It is, no doubt, an incidental advantage, that it advises the carrier in advance of what amount he will have to pay, and allows him thus to arrange his business accordingly. Any rule which violated this principle would degenerate to an arbitrary exaction.

XII. While this Court must, in the absence of Congressional legislation, decide, as an abstract proposition, what, in its opinion, requires a uniform regulation in matters of commerce, yet, when Congress, a co-ordinate branch of the Government, with full power and means of ascertaining by a thorough investigation of all the facts, has deliberately decided that the needs of the General Government do not require a uniform regulation concerning certain matters of commerce, this Court has followed such determination without hesitation.

" The Act (of Congress) of 1789 contains a clear and author-
" itative declaration that the nature of this subject is such that,
" until Congress should find it necessary to exert its power, it
" should be left to the legislation of the States."

Cooley vs. Bd. of Wardens, *supra*, 319.

" It is for Congress to determine when its full power shall
" be brought into activity."

Gilman vs. Philadelphia, *supra*.

"This Act (enrolling steam boats) demonstrates the opinion of Congress."

Gibbons vs. Ogden, p. 221.

Absence of regulations by Congress of matters not required to be of uniform rule " is rather to be deemed a declaration

" that, for the time being, and until it sees fit to act, they may " be regulated by State authority."

County of Mobile vs. Kimball, *supra.*

Congress sanctioned the State pilotage laws in 1789.

By Chapter XII., 1st U. S. Statutes at Large, p. 619, Congress directed the Customs officers to observe and assist in the enforcement of the quarantine and health laws of the several States.

By Chapter V., 2d U. S. Statutes at Large, p. 106, Congress directed that, until the State inspection laws were complied with, the clearance of vessels should be withheld.

By Chapter X., 2d U. S. Statutes at Large, p. 205, State laws, prohibiting the importation of colored persons, are enforced.

As the States have power to exclude habitual criminals, &c., and as the failure of Congress to legislate on a subject over which the States have control leaves the States free to act (County of Mobile vs. Kimball, *supra*), and as Congress prior to May 27th, 1881, had only legislated that criminals actually serving a term, or whose term of sentence had been remitted on condition of emigrating, and women imported for the purpose of prostitution were to be excluded. (Chapter 141 U. S. Laws, 1875, vol. 18, p. 477), it follows that the laws of New York, which did not legislate in reference to either of these persons, but which were confined to habitual criminals, paupers, idiots, lunatics and diseased persons, occupy a field left wholly free from congressional legislation and cannot therefore be successfully challenged as occupying a domain over which Congress has assumed jurisdiction.

But assuming that any portion of the present inspection law is provided for by act of Congress, that merely suspends the operation of such portion, and the tax does not apply thereto. So it was held in the wharfage cases that even if a portion of the ordinances were unconstitutional that did not invalidate the wharfage charges, and that question would only arise when the unconstitutional provisions were sought to be enforced.

That Congress regards this right always to have existed in the States is evident from very recent legislation. Chapter 327, vol. 20, U. S. Stat. p. 177 ratifies the acts of every State and municipal officer and corporation in the collection of head

moneys prior to January 1st, 1877, pursuant to the then existing laws of the several States.

By chapter 376 U. S. Laws of 1882, vol. 22, p. 214, a duty of fifty cents is levied for each alien passenger upon the Master, owner, agent or consignee, which shall be lien upon the vessel.

For the purpose of executing the law for the support and relief of distressed immigrants and the exclusion of convicts, lunatics, idiots and paupers, the Secretary of the Treasury is to enter into contracts with such State commission, board or officers designated by the Governor of the State to take charge of the local affairs of immigration at the ports of such State.

No greater sum shall be expended at any port than is collected at that port.

By chapter 327, Laws of 1878, vol. 20, p. 177, Congress directly approves of all existing State legislation for the collection of moneys from carriers of immigrants. "If the Consti- "tution excluded the States from making any law regulating "commerce certainly Congress cannot regrant or in any manner "reconvey it to the States." (Cooley vs. Board of Wardens, 12 How., 318). Congress cannot confer power on the States to violate the Constitution. This Court will always uphold acts of Congress as passed in the valid exercise of a constitutional power when such construction is possible. This is especially true regarding matters involving a discrimination by Congress as to how far in its judgment a regulation of Congress is required to be of a uniform rule or is best left to local administration.

The decision of Mr. Justice Blatchford, brought here for review, was the operating cause of the enacting of chapter 376, Laws 1882, vol. 22, p. 214, but even here when Congress has been directly coerced by the decision of the Circuit Court into coming to the relief of the State, the execution of the Federal Law is remitted to the State board or officers charged with the execution of the local affairs of immigration and the expenses at each port are limited to the tax collected at that port, thus practically remitting the execution of the law to the State. Indeed, no State but New York has availed itself of the law by the Govenor thereof designating the local board of State officers in charge of immigration with whom the Secretary of the Treasury may contract. This uniform and universal law is practically a dead letter, except for the local needs of the port of New York, which alone had need of relief. Congress has, therefore, been

compelled to enact in form a uniform regulation and tax for all ports to provide for the necessities of one. Nothing further is needed to demonstate that the regulation in question is not one which requires a uniform rule, on the contrary a uniform rule will operate most unjustly and with marked inequality.

A *per capita* tax which would be sufficient to pay all expenses of executing the law as to 450,000 immigrants per annum at the Port of New York would be wholly insufficient to pay for the execution of the same law on 40,000 immigrants at the Port of Boston--8,000 a week to 800 a week, or 1,200 a day to 115 a day. The expense per immigrant is inversely to their number.

If the tax be fixed at the minimum which would be based upon the cost at New York, it would be insufficient at Boston, Philadelphia, Baltimore and elsewhere. If, on the other hand, the tax be fixed at the maximum or at any sum above the necessary cost at New York, the commerce of New York is immediately burdened without cause in order that the commerce of another port may pay the exact expense there. This is but one of the many illustrations which can be drawn, showing how irreconcilable are the proper execution of laws for the local inspection and care of diseased persons and exclusion of obnoxious immigrants at a great port, the depot of immigration, and at ports receiving but a tenth or less of such persons, with any uniform tax or regulation. Castle Garden and Ward's Island, so far as it is occupied by the hospitals and asylumns under the charge of the Commissioners of Emigration, grew out of the absolute necessities of New York City caused by immigration; they do not exist elsewhere because there is no need of them or anything like them. As many as five thousand immigrants have been landed in a day at Castle Garden. To say that a regulation such as is required to protect New York City from the diseased, the pauper, &c., must be uniform with that of every other port is to say that every village must be given a city charter with its expensive machinery of government.

If you attempt by a uniform tax to pay these unequal expenses, an unnecessary burden is imposed upon the commerce of one port to relieve that which should be borne by others; which would in itself be unconstitutional.

Art. 1, § 9, Subdiv. 5:

"No preference shall be given by any regulation of commerce or revenue to ports of one State over another."

The ground of objection to the State tax is that it is a regulation of commerce—if so in the State it must be so in Congress; to take money raised from a regulation of the commerce of New York to spend in aid of the commerce of Boston or elsewhere is unconstitutional.

To vary the tax with the necessities of each port admits that the regulation does not require a uniform rule, which admission is fatal to the exclusive jurisdiction of Congress.

But all duties, imposts and excises levied by Congress "shall be uniform throughout the United States."

Art. 1, § 8, subdiv. 1.

As long as the State impost is limited to the necessary expenses of inspection to keep out criminals, lunatics, paupers and persons with contagious diseases, it is by no means a breach of that uniformity which the constitution prescribes as to all national imposts. The object of that provision is to prevent any State from being unjustly discriminated against by Congress.

XIII. It is sought to bring the laws of New York passed in 1881 within the decisions of this Court in Henderson vs. The Mayor and the Chy Lung case (92 U. S.). It ought to be a sufficient answer to say that in express terms those cases refrain from expressing any opinion on the subject.

"The portions of the New York Statute which concern persons who, on inspection, are found to belong to these classes (actual paupers, vagrants, criminals and diseased persons), are not properly before us."

Henderson vs. Mayor, 92 U. S., 225.

"When a State Statute limited to provision necessary and appropriate to that object alone, shall, in a proper controversy, come before us, it will be time enough to decide that question."

Chy Lung vs. Freeman, 92 U. S., 280.

In the Railroad Co. vs. Husen, 95 U. S., 470, this Court said, in speaking of the Henderson and Chy Lung casef:

"The two latter of these cases refer to obstructions against the admission of persons into a State."

A State "may exclude from its limits convicts, paupers,

idiots and lunatics,and persons likely to become a public charge, as well as persons afflicted by contagious diseases."

Ibid, p. 471.

See also County of Mobile vs. Kimball, and case of Ah Fong, cited *supra*.

XIV. The power of Congress to enact uniform laws on the subject of bankruptcy only, suspends those portions of the State bankrupt and insolvent laws in conflict with those of Congress.

"Congress shall have power to establish uniform laws on the subject of bankruptcies throughout the United States."

Of which Chief Justice Marshall said:

"It is not the right to establish these uniform laws, but their actual establishment which is inconsistent with the partial acts of the States."

Sturges vs. Crowninshield, 4 Wheat., 196.

The ground on which the States were held to be inhibited from granting a discharge of the bankrupt from his debts, was the constitutional inhibition to impair the obligation of contracts, not under the Congressional power, to pass a uniform law of bankruptcy.

Ibid, p. 199.

XV. Although it is stipulated that the demurrer is based upon the claim that Chapter 432, passed May 31, 1881, by the Legislature of New York, is unconstitutional (fol. 29); nevertheless, in the discussion in the Court below, the counsel for defendant sought to sustain the demurrer by reference to the treaties between France and the United States, which place French citizens on the same footing as those of the most favored nation--a clause of similar import will be found in many treaties with other countries. It was with a view to place all countries upon the same footing and prevent discriminating State legislation that Congress enacted and re-enact as part of the Revised Statutes, Section 2164:

"No tax or charge shall be imposed by any State upon any person immigrating thereto from a foreign country, which is

not equally imposed and enforced upon every person immigrating to such State from any other foreign country."

XVI. It is not claimed that the tax is excessive—indeed such question could not be raised by demurrer. The Constitution has, in the first instance, committed that question to the judgment of the State, prescribing that the amount shall be absolutely necessary for executing the inspection law, and that as there must even then be a surplus it shall be for the use of the Treasury of the United States. Next the Constitution subjects all such laws to the revision and control of Congress.

If the amount is excessive, Congress can and will control it.

But immigration has varied in the last five years from 60,000 to 469,000, and had in the preceding five years run from 50,000 to 290,000. A tax cannot be made to ebb and flow with the tide. If the tax as a mean is just, no fault can be found with it.

XVII. A State law which is directly subject to the revision and control of Congress cannot, from the nature of it, be a usurpation of the power of Congress. That which is subject to any power cannot be paramount. But it is only as paramount to the power of Congress that the State law can be held to be a usurpation; that is, the State law must be passed in the exercise of some claim of right, which if conceded, denies the power of Congress to revise and control it. In the case at bar the contrary is true. The State has enacted an inspection law and imposed an impost for its execution, devoting only so much of the tax thereto as is necessary to execute its inspection laws, and covers the balance into the Treasury of the United States. Over this law the absolute power of revision and control is in Congress without possibility of denial. Wherein then lies the usupation of power from Congress?

XVIII. The following principles have been decided by this Court:

Gibbons vs. Ogden:

1st. That in matters of commerce where Congress has acted, such action is exclusive.

2d. That the power to tax is not a power to regulate commerce.

3d. That the undoubted right of a State to pass inspection laws, though affecting commerce, is not derived under a power to regulate commerce.

4th. That the opinion of Congress demonstrates what are and what are not deemed Federal regulations of commerce.

Passenger Cases:

1st. That a tax upon all oceanwise and coastwise passengers to pay for the support of the Marine Hospital, not limited to emigrants, and to the Society for the Reformation of Juvenile Delinquents in the City of New York, was unconstitutional.

2d. That the right of the State to exclude paupers, criminals, &c., was a part of their sacred law of self-defense.

3d. That a State tax levied upon a prohibitive principle was invalid whether prohibitative in fact or not, whether two or two hundred dollars a head.

Cooley vs. Board of Wardens:

1st. That State pilotage laws affecting commerce were constitutional and had been approved by Act of Congress.

2d. That only those regulations of commerce which inhere in the Federal Government, or which, from their nature, require a uniform rule, are within the exclusive jurisdiction of Congress.

3d. That a declaration by Congress that the nature of a subject (the regulation of commerce) is such that the States may regulate it until Congress acts, is authoritative with this Court.

4th. The commerce clause was to prevent discriminating State legislation as against other States; that a State tax on pilotage was a discrimination against the State passing it, and not within the evil sought to be remedied.

Peete vs. Morgan:

1st. That the State power to enact a law carries with it the right to lay a tax on the cause of expense to the State in executing the law—quarantine regulations.

2d. That a State tax on tonnage for revenue, though not for an appropriate purpose, was void as a tonnage tax, and not as a regulation of commerce.

Henderson vs. The Mayor:

1st. That a State tax on all passengers, two-thirds thereof to pay for the general support for four years of all immigrants who should be, or thereafter become, paupers, and to find situations for the immigrants, the other third being distributed to the various counties of the State, was void.

2d. That an impossible bond with a possible commutation in money was a mere evasion of the decision in the *Passenger Cases.*

3d. That the portions of the law of New York relating to inspection of passengers were not before the Court, and not passed upon.

4th. That the limit to the State's right of protection was not determined.

5th. It was suggested that Congress would better settle the question.

Chy Lung case:

1st. That an arbitrary exaction by a State officer for persons designated by him, he fixing the amount, to be used for the support of all the paupers of California, was invalid.

2d. That when a law appropriately framed for the purpose of excluding convicts and paupers should come before this Court in a proper case, it would be time enough to discuss it.

Railroad Co. vs. Husen:

1st. That the States may pass reasonable quarantine and *inspection* laws necessary for protection.

2d. That a total exclusion (of cattle) is beyond the necessity of the case, and void.

Patterson vs. Kentucky:

That State laws to protect the health of its people, though in a greater or less degree affecting commerce, are not enacted for such purpose, and, so far as they injuriously affect commerce, are subject to the control of Congress.

Machine Co. vs. Gage:

That this Court did not decide in Henderson vs. The Mayor how far a State might protect itself from the influx of paupers and criminals.

Transportation Co. vs. Wheeling:

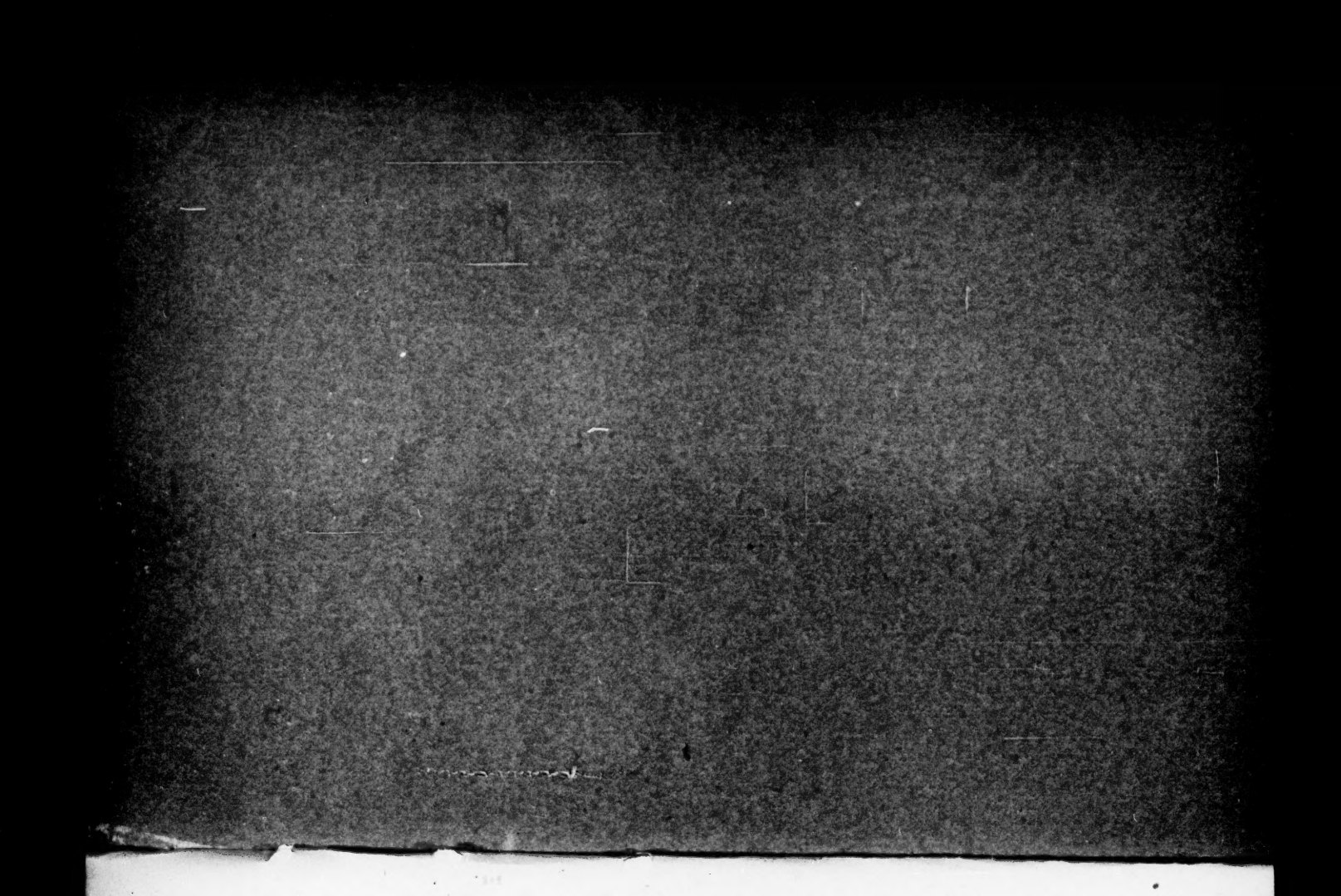
That it is the settled rule of construction by this Court "that the commercial clause of the Constitution *neither confers, regulates nor prohibits taxation.*

Mobile vs. Kimball:

That inaction of Congress upon subjects of a local nature or operation is a declaration by Congress that the States are free to act until Congress does.

XIX. The judgment should be reversed.

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Of Counsel for Plaintiffs in Error.



17-55
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FILED
DEC 23 1882
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Supreme Court of the United States.

No. 867. Argued December 18 and 19.

PEOPLE OF THE STATE OF NEW YORK

vs.

COMPAGNIE GENERALE TRANSATLANTIQUE.

PLAINTIFFS' POINTS IN REPLY.

SUBMITTED BY PERMISSION OF THE COURT.

(*Served on opposing counsel.*)

I. The whole defense is based upon the misconstruction of a single sentence in the *Henderson Case*, wrested from its application to a tax to carry on a law not for the exclusion but for the admission and support of paupers. The court held as to such a tax that it was idle to contend that the tax itself would tend to keep out paupers when the law did not, saying in the Passenger Cases "the States have not reserved the right of taxation universally as a *means* to turn off paupers," and in the Henderson Case "it is a strange mode of doing this" ("*protecting the State against the consequences of the flood of pauper immigration*,") "to tax all passengers who come from abroad alike" while actually letting the paupers in. It is plain this language has no application here. Is it indeed a "*strange mode*" of keeping paupers out to pass a law excluding them and levy the expense of executing the same on the parties bringing them?

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But it is a "strange mode" of preparing a decision for this Court in this case to cut a sentence out of a ruling that a tax to support a law that did not exclude paupers could not be sustained on the theory that the tax itself did or that it supported *admitted* paupers, and apply it to a law which does exclude them and a tax limited to the execution of that law. It is all of a piece with these methods of the defense to divert attention from their own processes by charging the State with fraudulent evasion of the decision in amending its laws so as to obviate the just criticism of the Court. In this connection we ask renewed consideration of the citations bearing on the said sentence in pp. 4 to 7 of our appendix to original brief.

The defense take a ruling that a "tax having no other limitation," than the "*discretion*" of the State is void, as assuming the right to "*exclude all immigrants*" because "*having no other limitation*" the tax may be "*increased* in *its discretion*" (7 How., 447–8 and 461), and apply it to a tax strictly limited to excluding paupers, &c.

When formerly the State admitted such persons it accepted them as a part of its population, thereby assuming their care, and could not afterwards levy the expense thereof on other passengers or the carriers. But now, on the contrary, when the State *excludes* them, *they continue foreign paupers*, holding them for re-embarkation not being an admission of them into the population. Then, not only can "no just rule" make American citizens pay the expense of these foreign paupers; *but Congress has no right to force such expense on the States by direct action.*—Much less can the courts assume that Congress has done so by inaction, especially when all the action of Congress has been favorable to State protection, even to the extent of validating the former taxes.

The courts would only abrogate the established permissive and revisory power of Congress, in the present case, by requiring it

to authorize the tax in advance, and would thus curtail the prerogatives of Congress under color of sustaining them.

The last act of Congress (1882) demonstrates that in its judgment uniformity is not essential to the administration of the subject by remitting it to the local boards *and leaving the acceptance and application of the tax levied to the option of the States.* This is conclusive on the courts.

II. The ruling asked for by the defense would prevent Congress as well as the States from levying this tax; for unless passengers are "imports" the Constitution gives Congress no power to levy a tax on them to execute such an inspection law, unless the right to enforce such a law carries with it the power to levy the expense thereof on the subject-matter. If so, this would apply equally to the State in advance of congressional action.

III. The logical conclusion of the defense is, that the power to levy this tax on the subject matter to execute this State inspection-law does not reside either in the State or Federal Government. But it is conceded that it was in the State anterior to the Union. It is certainly not prohibited to the State either directly or by being transferred to the United States, not at least until the latter pass a uniform inspection-law for all the States, since it is not until then that they can levy a uniform inspection impost, and they can levy no other.

"The powers not delegated to the United States by the Con-
"stitution, nor prohibited by it to the States, are reserved to the
"States respectively, or to the people." (10th Amendment to the Constitution.)

IV. Conceding that this inspection-tax is a regulation of commerce, it cannot be held to be any more so than the inspection-law which it is limited to executing, without overturning the ruling that taxation *per se* is not a regulation of commerce—*stare decisis.*

V. The defense are constrained to contend that all commercial subjects which "*admit*," not "*require*," uniform regulation are within the exclusive control of Congress *ab initio*. Hence quarantine and pilotage laws being held within the power of the State, the defense are logically compelled to maintain that they do not "*admit*" of uniform regulation by Congress, thus before the defense complete their circle they are found denying the control of Congress which they profess to uphold. This is consistent with their protest against the constitutionalty of the recent tax levied by Congress.

VI. "*Habitual criminals*" are those who are such in countries whence they come, *i. e.* criminals who have been *convicted a number of times*, as in England.

VII. There are other laws which the Commissioners of Emigration execute at the expense of the State. The present tax is absolutely limited to the constitutional execution of the inspection, whatever that may be. If persons are retained any longer than sickness or other hindrance to re-exportation makes them "*a necessary public charge*," that expense cannot be collected out of the tax, but is chargeable to the State, under the execution of the other laws. It is also plain that persons, who have means to pay their own expenses, never become "*a necessary public charge*," even when sick, and the expenses of persons unable to pay have always been levied on the vessel-owner by lien on the vessel in quarantine laws.

VIII. Inspection of "*white servants*," and "*apprentices bound to service*," admitted to be "*imports*," would be the same as that of any other immigrants. Where is the distinction?

IX. Every possible fact and construction of law *must* be assumed in favor of the constitutionality of a law on demurrer, and there

must be a *clear* and *distinct* violation of the *terms* of the Constitution and not merely of its supposed spirit or policy. In case of doubt the law should be sustained. (*Brown* vs. *State of Maryland*, 12 Wheat., 419, 437; *Cooper* vs. *Teyfair*, 4 Dallas, 18; *Serrano* vs. *United States*, 5 Wall., 469; *Maine vs* vs. *Illinois*, 94 U. S., 123; Brisco *vs.* Commonwealth's Bank of Kentucky, 8. Pet., 118; Mayor *vs.* N. Y., 8 Pet., 122; Cooley's Constitutional Limitations, (4th ed.,) pp. 199 to 214 and 220 to 225.)

X. The question whether the former taxes were added to the fares or not was immaterial to the former decisions. They were pronounced unconstitutional in either view. The court did not assume the fact without evidence for the purpose of holding the taxes unconstitutional. Neither can that be done against the solemn statement of counsel showing that no such taxes have ever been added to the fares, with good reasons why they are not. Former taxes were made a lien on passenger's baggage.

Here, on the contrary, all the arguments of the defense fall with this assumption. An Englishman is not taxed for a Frenchman, nor well men for sick; but the carrier of all is taxed alike, whether he be English or French, well or sick.

But, again this question is wholly irrelevant here, for if the *aggregate* of the tax is not excessive, then the *average* of it can not be either, for it is the *average* that makes the *aggregate*.

The whole question is: Are the inspection-charges proportional to the number of alien immigrants on a vessel, or at least as nearly so as pilotage and wharfage charges are to their expenses. If so, they must be sustained. It cannot be *assumed* that they are not, without overturning the above authorities.

XI. The construction claimed—that § 2164 R. S. requires the State to establish a line of officers along the Canada border to collect a tax from all strangers crossing her borders to protect

the State from an imaginary evil, a system costing several hundred dollars for every dollar collected, cannot obtain. The tax is upon the specific traffic in passengers to protect the State from the evils attending that traffic. The Canadian coming by vessel into the port of New York comes on an equality with the rest of the world. The German or Italian crossing the Canada border comes upon equal footing with the Canadian. It might as well be claimed that uniform quarantine regulations required a vessel from Greenland to be detained the same time and placed under the same *restrictions* as vessels from infected ports in the West Indies. The sole object of the State is protection, that of § 2167 is to prevent discrimination not to force an extension by the State of the area of taxation.

A construction of § 2164, which requires the State to establish an expensive system extending over a line of five hundred miles, to collect a tax where there is no injury caused to the State by an occasional immigrant, can only be sustained upon the theory similar to the use of customs agents by the United States for the protection of revenue, but revenue to the State is denied to the State *here*.

THE ISSUES.

To make this judgment final and conclusive on the whole subject, we respectfully request the decision of the following essential questions:

1st. Is this tax any more a regulation of commerce than the inspection law it is limited to executing, when taxation is not *per se* a regulation of commerce?

2d. Is the control of Congress over a commercial subject *exclusive*, unless it absolutely *requires*, and not merely *admits of*, uniformity of regulation "for all the States alike?"

3d. Does this inspection-tax *require* uniformity of regulation any more than the inspection law itself, or than quarantine or pilotage charges; and do not the latter *admit of uniformity?*"

4th. Does a ruling declaring to be prohibitory on "all immigrants" and violative of Congressional control, a tax "having no other limitation than the discretion of the State"—apply to a tax constitutionally limited to the exclusion of prohibitable persons and subject to the revision and control of Congress?

5th. Does not the power to execute such an inspection-law carry with it the power to enforce it by tax levied on the subject-matter and parties responsible, as it does with respect to quarantine and pilotage charges? If not, whence does Congress derive power to levy such a tax unless passengers are imports?

6th. Are not inspection imposts expressly allowed by the Constitution as to all *imports*, including white servants and apprentices; and, if so, do they not apply to all other immigrants? Or can *similar* inspection imposts be held *unconstitutional in principle?* Certainly, inspection is not limited to excluding defective "*articles*" of apprentice, nor to "*improving the quality of the article.*"

7th. If the carrier is liable to pay the tax, *can he make it unconstitutional* by adding it to his fares, and can it be *assumed* that he does contrary to the fact, which the State has the right to prove?

WILLIAM M. EVARTS,
LEWIS SANDERS,
GEORGE N. SANDERS,
Counsel for Plaintiffs.

8th If these immigrations inspection charges are leviable on the carriers, is being levied in the form of an impost void as a regulation of commerce in conflict with congressional control? The answers given to this are conclusive. See pp. 8-9, 16-19, 38-9, 44-5, of Brief and p. 1 of Appendix.

OFFICE SUPREME COURT
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17-59

Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiff in Error,

vs.

THE COMPAGNIE GÉNÉRALE TRANSATLANTIQUE,
Defendant in Error.

Brief in Behalf of Defendant in Error.

COUDERT BROTHERS,
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No. 68 *William Street, N. Y.*

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Of Counsel.

NEW YORK:
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1882.

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Defendant in Error.

October Term, 1882.
No. 867.

Brief in Behalf of the Defendant in Error.

STATEMENT.

This is a writ of error to the Circuit Court of the United States in and for the Southern District of New York.

The action was brought by the People of the State of New York against the Compagnie Générale Transatlantique, a corporation of the Republic of France owning and operating a line of steamships plying between the port of Havre, France, and the City of New York, to recover the sum of seven thousand seven hundred and sixty-seven dollars and fifty cents (7,767.50), alleged to be due to the said State under and by virtue of an Act of the Legislature of New York, passed May 31st, 1881, and known as Chapter 432 of the Laws of that year, as a debt and penalty for bringing to, and landing at the port of New York by the defendant of six thousand two hundred and fourteen (6,214) alien passengers, upon whom the said Act imposed a tax of one ($1) dollar each, payable by and constitut-

ing a debt against the defenpant corporation. The suit was commenced in the Court of Common Pleas for the City and County of New York, and upon the petition of the defendant was removed into the Circuit Court. The defendant, after the removal of the cause, interposed a demurrer (Record, folio 3), which, together with a stipulation signed by the attorneys for the respective parties (Record, folio 29), amount to a plea that the Act of the Legislature above referred to, and under which the suit was brought, is inoperative and void as contravening provisions of the Constitution and Laws of the United States, and treaties made and existing between the United States and France, a foreign nation.

The case was argued before Mr. Justice Blatchford, then Circuit Judge for the Second Judicial Circuit, who afterwards rendered a decision (Record, folio 387) sustaining the demurrer and ordering judgment for the defendant. Judgment having accordingly been duly entered, the plaintiff sued out this writ of error.

POINTS.

I.

The act of the Legislature of New York, above referred to, is a manifest attempt to do the very thing which this Court has heretofore condemned and declared beyond the powers of the State to effect, in the case of Henderson *vs.* The Mayor, &c. (92 U. S., 271).

The act declared unconstitutional in that case provided that the master or owner of every vessel landing passengers at the port of New York from any foreign port should make a report to the Mayor, containing the name, age, residence, &c., of every alien passenger who shall have landed from such vessel on her then last voyage to the said port; and on this report the Mayor was to endorse a demand upon the master or owner that he give a bond for every passenger landed in the city in the penal sum of three hundred dollars conditioned to indemnify the Commissioner of Emigration, and every county, city and town

in the State against any expense for the relief or support of the person named in the bond for four years thereafter ; but the owner or consignee could commute for such bond and be released from giving it by paying, within twenty-four hours after the landing of the passengers, the sum of one dollar and fifty cents for each one of them. If neither the bond was given nor the commutation sum paid within the twenty-four hours, a penalty of five hundred dollars for each passenger was incurred, which was made a lien on the vessel, collectible by attachment at the suit of the Commissioners of Emigration.

So much of the Act of May 31st, 1881, as it is deemed proper at this place to refer to, is as follows :

" Sec. 1. There shall be levied and collected a duty of one " dollar for each and every alien passenger who shall come by " vessel from a foreign port to the port of New York, for whom " a tax has not heretofore been paid, the same to be paid to " the Chamberlain of the City of New York, by the master, ,, owner, agent or consignee of every such vessel within " twenty-four hours after the entry thereof into the port of " New York."

" Sec. 2. It shall be the duty of the master of every such " vessel within twenty-four hours after its arrival at the port " of New York, to report, under oath, to the Mayor of the " City of New York the names, ages, sex, place of birth and " citizenship of each and every passenger on such vessel, and " in default of such report, every passenger shall be pre- " sumed to be an alien arriving at the port of New York for " the first time. And in default of every such payment to " the Chamberlain of the City of New York, there shall be " levied and collected of the master, owner, agent or con- " signee of every such vessel, a penalty of twenty-five cents " for each and every alien passenger, in addition to the duty " heretofore imposed."

The presumption of constitutionality, usually invoked where the validity of a law is brought into question, cannot be said to exist in this case.

The truth of this proposition is evident from a perusal of the opinion delivered by this Court in the case of Henderson *vs.* The Mayor, above referred to. The learned Court there disposed of the principal points which might otherwise come up for discussion in this case, and used language equally applicable to the legislation now under consideration. The Court

declared, at page 269 of the report: "It is said," (and that is precisely the contention of this case,) "that the purpose of "the act is to protect the State against the consequences of "the flood of pauper immigration from Europe, and first "landing in that city. *But it is a strange mode of doing "this to tax every passenger alike who comes from abroad.* "The man who brings with him important additions to the "wealth of the country, and the man who is perfectly free "from disease, and brings to aid the industry of the country "a stout heart and a strong arm are as much the subject of "the tax as the diseased pauper, who may become the object "of the charity of the city the day after he lands from the "vessel. *No just rule can make the citizen of France land-"ing from an English vessel on our shore liable for the sup-"port of an English or Irish pauper, who lands at the same "time from the same vessel.*"

The law now under discussion is in its purpose and effect a tax on the owner of a vessel for the privilege of landing in New York passengers transported from foreign countries. It is, in fact, an attempt to regulate commerce by laying a burden upon intercourse with foreign nations. To silence all discussion as to this point, we quote again from the opinion in *Henderson* vs. *The Mayor*, at page 271, "A law or a rule emanating from any lawful authority, which prescribes terms or conditions on which alone the vessel can discharge its passengers, *is a regulation of commerce;* and in case of vessels and passengers coming from foreign ports, *is a regulation of commerce with foreign nations.*"

II.

The prohibition against the levying of a tax on imports by a state being general and sweeping except in one single instance, it is incumbent upon the plaintiffs to show affirmatively everything necessary to bring themselves within that exceptional instance, and to prove that they are not violating the organic law. The rule that the one who alleges an exception must establish it, and that the burden of proof falls upon

him, is too well settled to require either elaboration or illustration.

The plaintiff's case is based upon the assumption that the law sought to be enforced, is an inspection law; or, as it is termed, an "*Immigrant inspection impost.*" To establish this it must appear: 1st, that the immigrant is an *import;* 2d, that a *per capita* duty, or impost upon *all* immigrants, is an *inspection duty;* 3d, that the money raised is *absolutely necessary* for executing this so-called inspection law; and 4th, that the "*net produce*" of the duties is, by the terms of the act, payable into the Treasury of the United States.

III.

That immigrants are not imports, in the ordinary sense of the term, no one will dispute. In popular language, to attach such a meaning to the word, would be deemed an audacious perversion of the term. It is true that a bare majority of this Court have held that such a sense might be imputed to that expression, but we respectfully submit that the law under discussion in those cases might and would have been declared unconstitutional even without that strained interpretation of so familiar a word. Nor can it be denied that the authority of the Passenger Cases has been much shaken.

"There is not to be found," says Mr. Justice Miller (Henderson *vs.* the Mayor, *supra*), "in the reasons given by the Judges who constituted the majority, such harmony of views as would give that weight to the decision which it lacks by reason of the divided judgment of the members of the Court. Under these circumstances, with three cases before us arising under statutes of three different States on the same subject, which have been discussed as though open in this Court to all considerations bearing upon the question, we approach it with the hope of attaining an unanimity not found in the opinion of our predecessors."

Mr. Justice Blatchford, in the Court below, in this case (Record, folio 59), discussing the question whether human beings can in any view be regarded as "imports," forcibly remarks: "The word 'imports' and the word 'exports' must

"have equal extent and scope. The former can have no "greater than the latter. *The suggestion that persons de-* "*parting from the United States by vessel could properly be* "*said to be 'exported,' or to be 'exports,' under any circum-* "*stances, or when retransported by public authority, is not* "*one which commends itself to the general understanding.* "If not '*exports*' they cannot be '*imports.*'" And the learned Chief Justice Taney, in the Passenger Cases, elaborately discussed the meaning of the term, denying its applicability to human beings, not chattels, and his reasoning on this branch of the case is so full that we content ourselves here by merely referring to it. If his logic fails to satisfy the Court, no argument of counsel for the defendant in this case will be of any value. If the meaning of the term "import" is still an open question, we venture to suggest that no Court in this country will ever hold that the refugees from other lands—irrespective of their condition, age, sex, ability to work, social, financial or political status—are to be classed as "imports."

IV.

But conceding that alien immigrants, on arrival at the port of New York, without reference to their circumstances or to their freedom of action, or even to their intent to remain in this country, are to be classed as imports or as "human animals," and liable to duty, the question arises, how far the act in question may be deemed an "inspection law." Here, again, we submit that violence is sought to be done to a familiar expression, and by a forced interpretation to draw from the language of the Constitution conclusions never contemplated when that instrument was framed.

The act is not in form or substance an inspection law. It is simply intended to provide payment for the support of possible paupers, who may, on arrival or in time, become a burden upon the public. The inspection laws contemplated by the statesmen who drew this provision, were laws for the inspection of merchandise.

This is abundantly manifest from the discussions in the

constitutional convention. No suggestion was ever made that any other meaning could be attached to the language used. On the contrary, the reasons alleged for permitting the States to resort to exceptional expedients for executing inspection laws were fully stated. It is hardly conceivable that men so thoroughly familiar with the use of language, and aware of the value that would be attached to every word of the instrument which they were drawing, could ever have confided so important a power as the *taxing of immigrants* to the States without using some adequate, proper and intelligible terms.

Inspection laws are defined by Mr. Abbott, in his Law Dictionary, as laws "authorizing and regulating the appoint-
" ment of inspectors, and the official examination by them of
" *produce or merchandise about to be offered for sale* * * *
" *The primary and proper principle of such laws is under-*
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Substantially the same definitions are given in the law dictionaries of Burrill and Bouvier.

These authorities agree also with Chief Justice Marshall in Gibbons *vs.* Ogden (9 Wheaton, 1), in which case he says: " The object of inspection laws is to ascertain the quality of
" all articles produced by the labor of the country and fit
" them for exportation or, it may be, for domestic use."

See also 1st Kent's Comm., 439; Story on the Constitution, § 1017.

In the State of New York at least the matter seems to be set at rest. The Supreme Court of Errors of that State, in the case of Clintsman *vs.* Northrop, reported in 8 Cowen, 45, decided that "inspection laws" are intended "to protect the com-
" munity, so far as they apply to domestic sales, from frauds
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V.

It is not to be denied that there is an operation performed by the Commissioners, in which an inspection or an examination into the condition of immigrants is made. But this inspection, it is respectfully submitted, is not the inspection contemplated by the framers of the Constitution. Even if such were the case, *the money raised is to be applied to other purposes than the mere examination into the condition of the immigrant.* Conceding, therefore, that the law in question might in a sense be regarded as an "inspection law," it is plain that the tax levied is not *absolutely necessary*, as it must be in order to become even as an inspection act. It is equally clear that the expense of ascertaining whether the inmates of a ship are afflicted with yellow fever or cholera, constitutes but a part of the expense to be defrayed by the Commissioners, and to be paid from the tax levied.

The learned and ingenious counsel for the plaintiff in the Court below, denied, it is true, that the fund was intended to support the immigrant, but stated at the same time that it was "intended to keep him from dying of hunger and cold." To the benefit of this nice distinction they are fully entitled, but we submit with no less confidence that that concession is fatal to the case; that there is nothing in the original scheme of our Constitution, or in the interpretation put upon it by the Courts, which will justify the States in compelling the prosperous traveler coming here with his family, for residence or pleasure, to feed, clothe and transport the unfortunate persons who are unable to provide for their own wants. This fatal objection which underlies all these statutes, is directly passed upon by this Court in the case of Henderson *vs.* The Mayor (*supra*).

VI.

The law in question is invalid because the "net produce" arising from the tax to be levied is diverted from the Treasury of the United States.

"No State shall," says the Constitution, "without the con-

sent of the Congress, lay any impost or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; *and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the Treasury of the United States*," &c. It needs no argument to show that the Act, by providing for the maintenance and support of a certain class of immigrants, whether such maintenance and support be temporary or not, does not dedicate the net proceeds of the tax to the use of the Treasury of the United States. "Net produce" obviously means the surplus after deducting the expenses of collection. This was apparently in the minds of the framers of this law, for, by Section 3 of the Act invoked by the plaintiff in error, it is made the duty of the Chamberlain of New York to pay over annually to the Treasury of the United States "the *net produce* of all the duties collected and received by him under this act *after the payments* to the Commissioners of Emigration aforesaid, and take the receipt of the Secretary of the Treasury therefor." If, therefore, the plaintiff's contention is correct that this is an inspection law, it violates the provision of the Constitution requiring the "net produce" of such a law to be for the use of the Treasury of the United States.

This view will find much to support it in the debates of the Convention which framed the Constitution.

Sec. 5, Elliott's Debates, supplement, pp. 119, 379, 381, 454, 455, 456, 478, 479, 482, 486, 502, 506, 538, 539, 540, 541, 548, 560.

The report in 5th Elliott, at page 486, is especially instructive :

"Article 13 was then taken up.

Mr. KING moved to insert after the word 'imports' the words 'or exports,' so as to prohibit the State from taxing either ; and on this question it passed in the affirmative.

Mr. SHERMAN moved to add, after the word 'exports,' the words 'nor with such consent but for the use of the United States,' so as to carry the proceeds of all State duties on imports or exports into the common treasury.

Mr. MADISON liked the motion, as preventing all State imports, but lamented the complexity we were giving to the commercial system."

VII.

It will not be denied, and in fact the learned counsel have expressly admitted, that the law under consideration imposes a tax upon a carrier who makes a profit by carrying immigrants, &c. In other words, the carrier is to pay one dollar per head on his passengers for the privilege of landing them at the port of New York. In default of this he pays a penalty of 25 cents in addition to the duty imposed. It is difficult to perceive why this provision and the effect of such a requirement do not bring the act directly within the condemnation already pronounced by this Court. We shall not attempt to clothe the argument in more forcible terms than have already been used by the learned Justice who delivered the opinion in the Henderson case.

"The effective operation of this law," he says, "commences at the other end of the voyage. The master requires of the passenger, before he is admitted on board, as a part of the passage money, the sum which he knows he must pay for the privilege of landing him in New York. It is, as we have already said, in effect, a tax on the passenger, which he pays for the right to make the voyage—a voyage only completed when he lands on the American shore. The case does not even require us to consider at what period after his arrival the passenger himself passes from the sole protection of the constitution, laws and treaties of the United States, and becomes subject to such laws as the state may lawfully pass, as was the case in regard to importations of merchandise in Brown *v.* Maryland, 12 Wheat, 417, and in the License Cases, 5 How., 504.

So, too, in Railroad Co. *v.* Husen, 95 U. S., 470.

"Transportation is essential to commerce or rather it is commerce itself, and every obstacle to it, or burden laid upon it by legislative authority, is regulation."

Citing case of the State Freight Tax, 15 Wall., 232.
Ward *v.* Maryland, 12 Id., 418.
Wellon *v.* Missouri, 91 U. S., 275.
Henderson *v.* Mayor, 92 U. S., 259.
Chy Lung *v.* Freeman, 92 U. S., 275.

The same learned Justice (in Henderson *v.* Mayor), adds

these words, which are equally applicable to the Act of 1881:

"It is too clear for argument that this demanding of the owner of a vessel for a bond or money on account of every passenger landed by him from a foreign shore, is, if valid, an obligation which he incurred by bringing the passenger here, and which is perfect the moment he leaves the vessel.

VIII.

We have abstained, in the discussion of this case, from referring with any particularity to that part of the 2d section of the Act of May 31, 1881, which makes it the duty of the master to report under oath to the Mayor of the City of New York the names, ages, sex, place of birth and citizenship of each and every passenger on his vessel. Such a requirement has been held not inconsistent with the constitutional limitation in the case of the City of New York *vs.* Miln, 11 Pet., 103. But it is respectfully submitted that the authority of that case having been shaken, even that part of the subject may be deemed *res nova*, and that in the light of more recent utterances of this Court we may claim that the exaction, with the penalty attached to it, is such an interference with the exclusive power of Congress to legislate upon subjects connected with commerce as to make the law itself void.

IX.

This Statute is also in violation of the provisions of Section 2164 of the Revised Statutes of the United States, which says: "No tax or charge shall be imposed or enforced "by any State upon any person immigrating thereto from a "foreign country, which is not equally imposed and enforced "upon every person immigrating to such State from any for-"eign county."

It will be observed that the so called "inspection" law now under consideration imposes a duty only upon immigrants

who shall come *by vessel from a foreign port* to the port of New York. All others are exempt from the tax, so that emigrants from Canada have no tax to pay. So, too, a cargo of these so-called "imports" might be landed at Philadelphia or even at Jersey City, opposite New York, and brought to New York without liability under the act, while the Commissioners of Emigration would be entitled to apply a part of the fund raised by the tax to their support and maintenance. This is a clear violation of Section 2164 of the Revised Statutes above cited which provides that a tax or charge of this character must be "equally imposed upon every person immi- "grating to such State from any other foreign country."

Counsel for the plaintiff in error have remarked that this section of the Revised Statutes is a recognition by Congress of the right of the States to impose immigrant duties; but the fallacy of this position is manifest, because the power to regulate commerce being *exclusively* vested in Congress, no part of it can be exercised by the States, and the authority of Congress cannot, therefore, be delegated to the States.

Gibbons *vs.* Ogden, 9 Wheaton, 1.
Passenger Cases, 7 How., 283.
Ex parte McNeil, 13 Wall., 236.
The State Freight Tax Cases, 15 *Id.*, 232, and cases cited, *supra.*

X.

As bearing generally upon the whole subject under discussion, we cite from the opinion of Chief Judge Church in the case of the People *vs.* Barlow and Curtis, reported in 50 N. Y., where that eminent Judge, at page 324 of the report, says:

"These questions of conflicting claims between the Federal "and State Governments should always be carefully consid- "ered, and Courts should be astute in settling them according "to the true character of the respective Governments, and "sedulously guard and preserve the rights and powers of "each. The highest interests of the States are promoted by

" yielding to the general Government and protecting it in the " enjoyment of unquestioned control over the subjects confided " to it by the Constitution ; while, on the other hand, the right " of the States in the free and absolute exercise of the great " mass of reserved powers, should be left unmolested by the " general Government. If this rule is carefully observed, colli- " sions will be avoided and the Government perpetuated, while " its violation tends to confusion, conflict and destruction."

And, again, at page 326, of the same report, the same Judge uses this language :

" It is true that a grant of power to the general Govern- " ment does not necessarily operate as a prohibition of the " same power by the States (Sturges *vs.* Crowninshield, 4 " Wheat., 122). There are subjects over which the general " Government and the States may exercise concurrent author- " ity. If the terms of the grant are not exclusive, and there " is no express prohibition upon the States, and no repug- " nancy or inconsistency in its exercise by the States, the au- " thority is concurrent.

" This subject is not one of that character. The whole sub- " ject of foreign intercourse is committed to the Federal Gov- " ernment. Indeed, this was one of the principal purposes of " the Union. As to foreign countries, the States, as such, are " unknown."

We beg leave also to call the attention of the Court to the opinion of the General Term of the Court of Common Pleas, of the City of New York—a State Court—declaring unconstitutional the act under review in this case. The opinion will be found printed as an appendix hereto, and the case not being reported, as far as known to counsel for the defendant in error, the opinion is given in full.

XI.

The attempt is made to justify the acts under consideration by claiming that they are in part founded on the right to pass and enforce inspection laws, and in part on the right of the State to protect itself against moral or physical contamination

by resorting to its reserved police power. That laws to support, transport, and retransport objectionable persons cannot be deemed "inspection" laws is, we think, apparent from the cases cited above. As to the reserved police power, its liability to abuse renders its exercise a subject requiring vigilant scrutiny. The more recent cases have dealt with the subject in such terms as to make apparent the danger which a liberal construction of the power thus claimed might carry with it. Any exercise of this authority must be confined to certain limits, or it becomes tainted with illegality. "The police power of a State cannot obstruct foreign commerce or inter-State commerce beyond the necessity for its exercise, and, under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution. And as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the Court to guard vigilantly against any needless intrusion."

Railroad *v.* Husen, 95 U. S., 473.

The learned counsel for the plaintiffs in error have sought to extract from two recent decisions of this Court (Tiernan *v.* Rinker, and Mobile *v.* Kimball,) language supposed to favor their contention. We respectfully submit that both these cases establish (or rather re-establish) principles entirely inconsistent with their view. If the learned Justices who wrote for the Court in these cases had in view precisely such a claim as that now urged and had intended to warn the State of New York that it could not by any legitimate legislation compel every foreign ship that entered the port of New York to pay one dollar per head for the privilege of landing its passengers, they could hardly have used more apt and emphatic language.

"Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property as well as the purchase, sale and exchange of commodities. For the regulation of commerce, as thus defined, there can be only one system of rules applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate States is not, therefore, permissible."

Mobile *vs.* Kimball, 102 U. S., p. 702.

Is it not too clear for argument that if commerce with foreign countries includes *navigation and the transportation and transit of persons*, Congress alone can pass that "one system of rules," which must be applicable to all States alike; and that any State effort to embarrass transportation and transit of persons, or any State action likely or calculated to bring about that result must be void?

So too in Tiernan *v.* Rinker (since followed and approved in Webber *v.* Virginia, 103 U. S., p. 14).

"In deciding the case (Brown *v.* Maryland) the Court observed that the power conferred by this clause to regulate commerce with foreign nations and among the several States is without limitation; and that to regulate commerce is to prescribe the conditions upon which it shall be conducted; to determine how far it shall be free from restrictions, how far it shall be subjected to duties and imposts; and how far it shall be prohibited; that when the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of State authority; that the portion of commerce with foreign countries, or between the States, which consists in the transportation and exchange of commodities, is of national importance, and admits and requires uniformity of regulation; that the object of vesting this power in the general government was to insure this uniformity against discriminating State legislation; and that to that end this power must cover the property which is the subject of trade from hostile or interfering legislation until it has become a part of the general property of the country and subject to similar protection, and no greater burden. If, before that time, the property can become subject to any restrictions by State legislation, the object of vesting the control in Congress may be defeated."

Tiernan *v.* Rinker, 102 U. S., 126.

What is said here of merchandise may be applied with equal force to persons—especially on the theory of the plaintiffs in error that they are "imports." The whole subject is *national in its character*, for the benefits of commerce extend over the whole nation. Judicious, consistent and equal laws regulating commerce must contribute to the national welfare; while unreasonable hindrances placed upon it necessarily interfere with and tend to defeat our public policy. Legislation of this

by resorting to its reserved police power. That laws to support, transport, and retransport objectionable persons cannot be deemed "inspection" laws is, we think, apparent from the cases cited above. As to the reserved police power, its liability to abuse renders its exercise a subject requiring vigilant scrutiny. The more recent cases have dealt with the subject in such terms as to make apparent the danger which a liberal construction of the power thus claimed might carry with it. Any exercise of this authority must be confined to certain limits, or it becomes tainted with illegality. "The police power of a State cannot obstruct foreign commerce or inter-State commerce beyond the necessity for its exercise, and, under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution. And as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the Court to guard vigilantly against any needless intrusion."

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character should, therefore, *be uniform*. That the subject admits uniformity has been heretofore declared by this Court in the case of Henderson *vs.* The Mayor, in which Mr. Justice Miller, at page 273 of the report, uses this language: "It is equally clear that the matter of these Statutes may be, and ought to be, the subject of a uniform system or plan. The laws which govern the right to land passengers in the United States from other countries ought to be the same in New York, Boston, New Orleans and San Francisco. A striking evidence of the truth of this proposition is to be found in the similarity, we might almost say the identity, of the Statutes of New York, of Louisiana, and California, now before us for consideration in these three cases."

The soundness of this view is not only apparent from the very nature of the case, but Congress itself has expressed its sense of this by actually enacting a *uniform regulation* in the premises (Act approved Aug. 3, 1882).

It must, therefore, of necessity follow, unless the recent utterances of this Court are disregarded or overruled, that the power is exclusive of State authority.

Finally.

The Judgment should be affirmed.

COUDERT BROTHERS,
Attorneys for Defendant in Error.

FREDERIC R. COUDERT,
Of Counsel.

APPENDIX.

N. Y. COMMON PLEAS.

THE PEOPLE

vs.

HENRY W. O. EDYE and WILLIAM VOLCKENS.

Argued at General Term, Nov., 1881.
Decision promulgated June, 1882.

Opinion of the Court.

VAN HOESEN, *J.:*

Clause two, of section ten, of article one of the constitution of the United States, concedes the right of the States to lay duties or imposts on imports and exports, for the purpose of defraying the expenses of executing inspection laws; and the plaintiff contends that Chap. 427 of the Laws of 1881, is an inspection law, within the meaning of the constitution. The act in question provides for the inspection of the persons and the effects of emigrants arriving by vessel at the port of New York. The first inquiry that presents itself is, Does the constitution provide for the laying of duties for the purpose of meeting the cost of inspecting the persons of immigrants? The constitution refers to imports and exports in connection with inspection laws, and it is conceded that imports and exports are things to be inspected. Having made this concession, the plaintiff assumes the burden of showing that immigrants are imports; for, if they be not, it follows that the act of 1881 cannot be upheld on the ground that it is an inspection law. The plaintiff's main reliance is upon the first clause of section nine of article one of the constitution, which provides that the migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by Congress prior to the year 1808, but a tax or duty may be imposed on such importation. From

this language, the plaintiff argues that persons are mentioned in the constitution as subjects of importation, and that if they be subjects of importation they must be imports.

This argument may be specious, but it is utterly unsound. It is a matter of common learning that section nine of article one refers to the importation of African slaves only. Slaves were generally regarded as chattels, though they were sometimes classed as persons. As chattels they would be imported; as persons they might migrate; and the words migration and importation were both used, because some regarded slaves as things whilst other regarded them as men.

The use of the word migration was a subject of discussion in the convention that framed the constitution, as well as in the conventions of the several States by which the constitution was adopted, and it was everywhere agreed that the language adopted was a euphemism, the intent of which was to secure the continuance of the slave trade for the term of twenty years.

I am aware that Judge Wayne and Judge Mackinley said, in their opinions in the passenger cases, that the use of the word *migration* showed that other persons than slaves might be imported, but they cited no authority in support of their views, and their dictum is in opposition to the opinion of Madison, of Chief Justice Taney, of Judge Story, and of every standard writer on American Constitutional Law.

Although Judges Mackinley and Wayne supposed that free men might, under section nine, be regarded as imports, they both explicitly declared that such importations could be taxed only by Congress, and that under no pretense whatever could the State lay any duty or impost upon them.

This result, those Judges declared, necessarily followed from the language of section nine.

To hold that immigrants were imports would not therefore aid the plaintiffs, for if they were, the State could not lay a tax upon them as such. But there is no reason whatever for regarding the word imports as applicable to human beings.

The ablest Judges who have ever occupied the bench of the United States Supreme Court have said that only personal property can be an import or an export. Property that is to be either imported or exported may be inspected by State authority, and imposts and duties may be laid upon it by the State to pay the expenses of such inspection.

It is a mistake to suppose the right to prevent the incoming

of persons or goods of a character likely to injure the community is derived from, or at all connected with, the right of executing inspection laws. Inspection of goods is merely a precaution intended to improve the quality of articles of traffic. The power to turn away paupers, criminals or persons afflicted with pestilential diseases, and to prevent the introduction of infected articles likely to spread contagion, is not founded upon considerations of commercial advantage, but upon the inalienable right of self-defense; a right possessed by States as well as by individual men. That right has not its origin in the Constitution, nor in that instrument will any clause be found by which it is to be regulated. The clause of section ten which recognizes the right of the State to execute its inspecting laws has no bearing on the question of the constitutionality of the Act of 1881. There may be an inspection of the persons and the effects of passengers for the purpose of ascertaining whether any of those arriving on a vessel are by reason of their criminal character, their pauperism, or their maladies, unfit to be received as dwellers in this State, and it may be that the expenses of such inspection should not be borne by the citizens of this State; but the right to make the inspection springs solely from the right of self-defense, which is inherent in the State, and the right to collect the expenses of the inspection from alien passengers who come here for the first time if such a right exist, is not derived from the Constitution of the United States.

In the earlier cases, it was assumed by all the distinguished Judges of the Supreme Court of the United States that the State unquestionably had the right to prevent the ingress of criminals and paupers.

That right was likened to the right which every State possesses of establishing quarantine. In some of the cases it was said that as the State could require vessels, cargoes and passengers to bear the expenses of the quarantine, so could it require vessels, owners and passengers to pay the expenses of an inquiry as to whether any of the passengers were unfit to become residents of this country. In some of the more recent cases, some of the Judges of the Supreme Court have said that there should be uniform laws regulating the qualifications for admission to residence in the United States, and that it was for Congress alone, and not for any of the States, to determine who should, and who should not, land

upon American soil. In all the cases, the doctrine is laid down that the law of self-defence has its limits, and that as the power to exclude criminals and paupers rests upon the right of self-defence, the State cannot exclude any person, or impose any tax as an incident to the enforcement of the right of self-defence, without showing that it has not gone farther than was necessary for its protection.

The recent utterances of some of the judges make it impossible to foretell what the decision of the Federal Supreme Courts may yet be as to the right of a State to prohibit the entrance of foreign criminals and paupers within her boundaries, but nevertheless it is clear that though the State may have that right, it cannot, in exercising it, impose a tax upon every alien passenger arriving for the first time at New York, because such a tax is, under the decision of the Supreme Court, a regulation of commerce, and the right to regulate commerce belongs exclusively to Congress.

I have not thought it necessary to cite any authorities, or to make any extracts from reported decisions, but the following cases warrant every observation I have made.

Gibbons *v.* Ogden, 9 Wheaton, 1.
Passenger cases, 7 How., 475-478 and 412.
Henderson *v.* Mayor, 92 U. S., 271.
Railroad Co. *v.* Husen, 95 U. S., 465, 473.
Chy Lung *v.* Freeman, 92 U. S., p. 275.
Story on the Constitution, sec. 1033.

The exceptions must be sustained, and judgment rendered in favor of the defendant.

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JAMES H. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882.—No. 867.

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiffs in Error,

vs.

THE COMPAGNIE GENERALE TRANSATLANTIQUE.

BRIEF

FILED, BY LEAVE OF THE COURT, ON BEHALF OF THE HAMBURG AMERICAN PACKET COMPANY, THE ROYAL EXCHANGE SHIPPING COMPANY (LIMITED), THE NORTH GERMAN LLOYD OF BREMEN, THE STATE STEAMSHIP COMPANY, THE OCEANIC STEAM NAVIGATION COMPANY (LIMITED), THE CUNARD STEAMSHIP COMPANY (LIMITED), THE LIVERPOOL AND GREAT WESTERN STEAM COMPANY (LIMITED), AND THE INTERNATIONAL NAVIGATION COMPANY.

WILLIAM ALLEN BUTLER,
THOMAS E. STILLMAN,
Of Counsel.

Evening Post Job Printing Office, N Y.

Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiffs in Error,

vs.

THE COMPAGNIE GENERALE TRANSATLANTIQUE.

October Term, 1882.
No. 867.

BRIEF

Filed, by leave of the Court, on behalf of the Hamburg American Packet Company, The Royal Exchange Shipping Company (Limited), The North German Lloyd of Bremen, The State Steamship Company, The Oceanic Steam Navigation Company (Limited), The Cunard Steamship Company (Limited), The Liverpool and Great Western Steam Company (Limited), The International Navigation Company, all Steamship Companies insisting, with the Defendant in Error, that the Statutes of New York, involved in this Cause, are in violation of the Provisions of the Constitution of the United States.

Statement of the Case.

The Constitution of the United States provides as follows:

"ART. I.; *sec.* 8. The Congress shall have power * * * "to regulate commerce with foreign nations and among "the several States.

"ART. I., *sec.* 10, subd. 2. No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be actually necessary for executing its inspection laws. No State shall, without the consent of the Congress, lay any duty of tonnage; and the net produce of all duties and imposts laid by any State upon imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of Congress."

The State of New York, by the Revised Statutes, enacted in 1830, required the payment by the master of every vessel arriving in the port of New York, of one dollar and fifty cents for every cabin passenger, and of one dollar for every steerage passenger, the moneys so received to be denominated "hospital moneys," and to be appropriated to the use of the Marine Hospital.

The question of the constitutionality of these provisions of the Revised Statutes was before this court and they were adjudged unconstitutional, in the

Passenger Cases (Dec. Term, 1848), 7 How., 283.

"Immediately after this decision the State of New York modified the statute on that subject, with a view, no doubt, to avoid the constitutional objection; and amendments and alterations continued to be made."

Opinion of the Court in Lenderson v. *The Mayor*, 92 U. S., 259, p. 267.

The States of New York, Louisiana and California severally made attempts to avoid the constitutional inhibitions against the levying by the States of a tax on foreign passengers by statutes requiring bonds to be given by the shipmaster or owner to indemnify the State against their becoming a public charge, with the privilege of commuting for the bond by paying a specific sum for each passenger. The constitutionality of these statutes came before the court in the cases of *Henderson* v. *The Mayor of New York, Commissioners of Immigration* v. *North German Lloyd, and Chy Lung* v. *Freeman*, 92 U. S., pp. 259–275.

The several State statutes were held to be unconstitutional and void.

Since the last cited decisions, and in May, 1881, the Legislature of the State of New York passed two acts in reference to passengers arriving at the port of New York from foreign ports.

The first of these acts, passed May 28, 1881, was as follows :

CHAP. 427.

"*An Act for the Inspection of Alien Emigrants and their* "*Effects by the Commissioners of Emigration.*

"[*Passed May* 28, 1881, *three-fifths being present.*]

"*The People of the State of New York, represented in Sen-* "*ate and Assembly, do enact as follows :*

"SECTION 1. The Commissioners of Emigration are here- "by empowered and directed to inspect the persons and "effects of all persons arriving by vessel at the port of New "York from any foreign country, as far as may be neces- "sary to ascertain who among them are habitual criminals "or pauper lunatics, idiots or imbeciles, or deaf, dumb, "blind, infirm, or orphan persons without means or capac- "ity to support themselves, and subject to become a public "charge, and whether their persons or effects are affected "with any infectious or contagious disease, and whether "their effects contain any criminal implements or contriv- "ances.

"§ 2. On discovering any such objectionable per- "sons or effects, the said the Commissioners of Emi- "gration and its inspectors are further empowered "to take such persons into their care or custody "and to detain or destroy such effects if necessary for the "public welfare, and to keep such persons under proper "treatment, and provide for their transportation and sup- "port as long as they may be a necessary public charge. "The Commissioners of Emigration shall in case of habitual "criminals, and may in other cases where necessary to pre- "vent such persons from continuing a public charge, re- "transport such person or persons to the foreign port from "which they came.

"§ 3. The Commissioners of Emigration are further em- "powered to board any incoming vessel from foreign ports "arriving at the port of New York, by its agents and in- "spectors, who shall have such powers as may be necessary "to the effectual execution of this act, and any person who "shall resist them in the execution of their lawful function "shall be guilty of a misdemeanor, and may be arrested by

" the officer resisted, and upon conviction may be sentenced
" to a term not exceeding six months in the penitentiary, or
" to pay a fine of one hundred dollars, or both.

" § 4. This act shall take effect immediately.

The second of the acts, passed May 31, 1881, was as follows:

CHAP. 432.

An Act to Raise Money for the Execution of the Inspection Laws of the State of New York.

[Passed May 31st, 1881; three-fifths being present.]

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

" SECTION 1. There shall be levied and collected a duty
" of one dollar for each and every alien passenger who shall
" come by vessel from a foreign port to the port of New
" York, for whom a tax has not heretofore been paid—the
" same to be paid to the Chamberlain of the City of New
" York, by the master, owner, agent or consignee of every
" such vessel, within twenty-four hours after the entry
" thereof into the port of New York.

" § 2. It shall be the duty of the master or acting master of
" every such vessel, within twenty-four hours after its arrival
" at the port of New York, to report under oath to the May-
" or of the City of New York the names, ages, sex, place of
" birth and citizenship of each and every passenger on such
" vessel, and in default of such report every passenger shall
" be presumed to be an alien arriving at the port of New
" York for the first time. And in default of every such pay-
" ment to the Chamberlain of the City of New York, there
" shall be levied and collected of the master, owner, agent
" or consignee of every such vessel a penalty of twenty-five
" cents for each and every alien passenger, in addition to
" the duty heretofore imposed.

" § 3. It shall be the duty of the Chamberlain of the City
" of New York to pay over from time to time to the Com-
" missioners of Emigration all such sums of money as may
" be necessary for the execution of the inspection laws of
" the State of New York, with the execution of which the
" Commissioners of Emigration now are or may hereafter
" be charged by law, and to take the vouchers of the Com-
" missioners of Emigration for all such payments. And it
" shall be the duty of the said Chamberlain to pay over

" annually on the first of January in each year to the " Treasury of the United States the net produce of all the " duties collected and received by him under this act after " the payments to the Commissioners of Emigration afore- " said, and take the receipt of the Secretary of the Treasury " therefor.

" § 4. The Commissioners of Emigration shall institute " suits in the name of the People of the State of New York, " for the collection of all moneys due or which may grow " due under this act, the same to be paid when collected to " the Chamberlain of the City of New York, to be applied " by him pursuant to the terms of this act.

" § 5. Section one shall not apply to any passenger whose " passage ticket was actually issued and paid for prior to " the time this act takes effect, but every ticket shall be " presumed to have been issued after this act takes effect in " the absence of evidence showing the contrary.

" § 6. This act shall take effect immediately."

In June, July and August, 1881, the defendant corporation brought in steamships of its line from foreign ports to the port of New York between six thousand and seven thousand passengers who had not previously paid any tax, and on default made by the defendant in respect of payment of the duty imposed by section 1 of the Act of May 31, 1878, an action to recover the amount of such duty, and of the penalty imposed in addition thereto by the same section, amounting together to $7,767.50, was commenced, by summons and complaint, in the Court of Common Pleas for the City and County of New York, in the name of the People of the State of New York, as provided by section 4 of said act, against the defendant corporation.

Rec., pp. 3, 4.

The action having been duly removed into the United States Circuit Court for the Southern District of New York, the defendant there demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action.

The ground of the demurrer being that the act of the Legislature of New York, under and in pursuance of which

the action was brought, was repugnant to the Constitution of the United States, and consequently null and void.

Rec., p. 9.

The demurrer was sustained, and the judgment entered for the defendant thereon, dismissing the complaint, has been brought to this court by the plaintiffs by writ of error.

Rec., p. 10, *p.* 1.

POINTS.

First Point.—The court below correctly held that the Statute of New York of May 31, 1881, imposes a tax upon passengers arriving in the port of New York by vessels from a foreign port (*Opinion, Rec., p.* 14). This it expressly does by section 1 (*ante, p.* 4). This is a regulation of commerce, and not within the power of the State.

Passenger Cases, 7 How., 283.

Henderson v. *The Mayor,* 92 U. S., 259.

The second section of the Act of May 31, 1881, which requires the master of every vessel bringing passengers from a foreign port to the port of New York to report, under oath, the names and other particulars in reference to the passengers, is simply in aid of the collection of the tax imposed by the first section. The fact that a similar requirement of a former act was upheld in *City of New York* v. *Miln,* 11 Pet., 102, gives no support to the act in question, because the decision in the last cited case was expressly confined to the validity of the requirement as to the report relating to the passengers, and did not touch the question of the taxing power.

Henderson v. *The Mayor,* 92 U. S., 259, *p.* 262.

By section 5, the tax imposed by section 1 is made applicable to every passenger described in section 1, whose passage ticket shall be issued after the act takes effect, so

that by its express terms the statute falls within the condemnation of this court, in its decisions relating to similar State legislation.

Second Point.—The court below also correctly held that the invalidity of the Act of May 31, 1881, was not cured by its being entitled "An Act to raise money for the exe- "cution of the inspection laws of the State of New York" (*ante* p. 4), or by its connection with the act passed three days earlier "for the inspection of alien emigrants and their "effects by the Commissioners of Emigration" (*ante* p. 3).

The two acts taken together will be construed and interpreted by the court, and their intent will be determined, in view of the subject matter to which they relate, the provisions of the Constitution, the course of legislation and the judicial decisions applicable to them.

It will be apparent that they are an attempt on the part of the State of New York to avoid the constitutional prohibition against a tax on passengers from foreign countries, by bringing the tax within the permitted exception relating to duties absolutely necessary for executing State inspection laws.

The acts are not within the exception.

The "inspection laws" of the States in force at the time of the adoption of the Federal Constitution, and those subsequently enacted, had a well ascertained meaning.

The definitions given by the court in *Gibbons* v. *Ogden*, 9 Wheat., 203; in *Brown* v. *Maryland*, 12 Wheat., 419, and by the text writers cited in the opinion of the Circuit Court and in the brief for the defendant in error, show that the State laws thus specified in the Constitution embraced only the systems of inspection as to goods and articles produced in the several States.

In the draft of the Constitution, as reported to the con-

vention, September 12, 1787, section 10 of article 1 contained the words: "No State shall, without the consent of "Congress, lay imposts or duties on imports or exports."

Madison Papers, vol. 3, *p.* 1552.

Mr. Madison reports in reference to this clause, that it was urged in the Convention by Mr. Mason, of Virginia, that "the restrictions on the States would prevent the in- "cidental duties necessary for the inspection and safe keep- "ing of their produce, and be ruinous to the staple States, "as he called the five Southern States. He moved as "follows: 'Provided, nothing herein contained shall be "construed to restrain any State from laying duties upon "exports for the sole purpose of defraying the charges of "inspecting, packing, storing and indemnifying the losses in "keeping the commodities in the care of public officers be- "fore exportation'" (*Id., p.* 1556). This he subsequently modified as follows: "Provided, that no State shall be restrained "from imposing the usual duties on produce exported from "such State, for the sole purpose of defraying the charges "of inspecting, packing, storing and indemnifying the losses "on such produce while in the custody of public officers; "but all such regulations shall, in case of abuse, be subject "to the revision and control of Congress," and it was agreed to by the convention, September 13, 1787.

Id., p. 1568.

On September 15, 1787, a substitute was agreed to in the language of the clause as it now stands in the Constitution (*ante, p.* 1).

In the State of New York laws for the purpose of inspection were passed as early as 1784, and an inspection system was continued in force until abrogated by the Constitution, which went into effect January 1, 1847, and which, by section 8 of article V, provided that "all offices for the weigh- "ing, gauging, measuring, culling or inspecting any mer- "chandise, produce, manufacture or commodity whatever, "are hereby abolished, and no such office shall hereafter be "created by law; but nothing in this section contained "shall abrogate any office created for the purpose of pro- "tecting the public health, or the interests of the State in

" its property, revenue, tolls or purchases, or of supplying " the people with correct standards of weights and meas- " ures, or shall prevent the creation of any office for such " purposes hereafter."

At the time of the Constitutional Convention in 1846, there were, as stated in the debate on the proposed article abolishing the system, " inspectors of flour, tobacco, ashes, lumber, " hides, leather, &c., amounting in number, with the weigh- " ers, gaugers, measurers, &c., to 380 " (*Debates, Atlas Edition, p.* 513), the laws were declared to " have failed to " accomplish the purposes they were intended to accom- " plish," and to be " a heavy and onerous tax on the producer or the consumer " (*Id, p.* 514). The object of the clause in the Constitution to abolish the system was stated by Mr. O'Conor to be " to divest the inspection laws of their " compulsory character, so that a man shall be perfectly free " to have his merchandise inspected or not as he should see " fit. It would render the inspection laws a perfect nullity " (*Id*).

In *Tinkham* v. *Tapscott*, 17 N. Y., 141, the New York Court of Appeals described the inspection laws as a system of laws which required a very large class of the productions of the soil and of manufacture and mechanical industry to undergo an inspection by public officers, preliminary to their being sold for the purpose of exportation, and in regard to some articles as a condition to their being sold and trafficked in in the State, and the history of these laws and the total abrogation of the system by the Constitution of 1846, is given at length by Judge DENIO (pp. 147, 148).

In Neilson v. *Garza*, 2 Woods, 287, it was held, by Mr. Justice BRADLEY, that " if any State, as a means of execut- " ing its inspection laws, imposes any duty or impost on " imports or exports, such impost or duty is void if it ex- " ceeds what is absolutely necessary for executing such " inspection laws." * * The scope of inspection laws is " very large and is not confined to articles of domestic pro- " duce or manufacture, or to articles intended for exporta-

" tion, but applies to *articles* imported, and to those intended " for domestic use as well."

And it will be found on examination that whenever any question has arisen in the Federal courts or in the State courts, in reference to the inspection laws of the States, those laws have never been treated or construed as having reference to subjects beyond those enumerated by the learned Justice.

The attempt to revive the abrogated inspection laws of New York in the particular instance of foreign passengers arriving in the port of New York, and as a foundation for a tax imposed on those passengers *per capita*, as passengers, was properly condemned by the court below, and has received a like just condemnation in the Court of Common Pleas for the City of New York. The conclusion is irresistible that the two acts of the Legislature of New York were intended to avoid the constitutional provisions, which, as construed by this court, stood in the way of the imposition of a passenger tax by State authority.

Third Point.—The acts in question cannot either separately or together be fairly termed "inspection laws," as they relate to subjects and acts which are not within the scope of inspection laws.

The inspection of the passengers and their effects contemplated by section 1 of the Act of May 31, 1881, is only the preliminary and initial step of a system for the care, custody and oversight of the "objectional passengers or effects," disclosed on the inspection, the detention, keeping and transportation of such persons, and their support, so long as they may be a necessary public charge. The whole machinery of that branch of the State government which is administered by the Commissioners of Emigration, and which concerns the vast body of emigrants arriving at the

port of New York, is thus brought within the contemplation and purview of the act, and under the title of "An Act for *the inspection* of alien emigrants," &c., the whole business and duty of the care, maintenance, detention and transportation of the criminals and paupers is embraced as a part of the inspection. It is only as an "inspection law," and to be executed as such, that the Act of May 28, 1881, can stand as the basis of the subsequent Act of May 31, 1881, which purports to be in aid of the execution of the "inspection laws" of the State (*ante, p.* 4). The court will take cognizance of the general facts connected with the immigration to this country by vessels arriving at the port of New York from foreign ports; the needs of the poorer and more ignorant classes of immigrants, and their destination to remote parts of the continent—and from these facts and circumstances, as well as from the plain terms of the acts themselves, it will be apparent that the main scope and object of the legislation in question are to provide, not for inspection, but for the necessary care, custody and disposition of a portion of the passengers at the expense of the whole, and by a direct tax on each individual passenger.

That the acts are to be construed in the light of the history of the time in which they were enacted, and of the facts and circumstances to which they apply, see

The Slaughter House Cases, 16 Wall., 36.
The Legal Tender Cases, 12 Wall., 457.
The Confiscation Cases, 11 Wall., 268.
The Granger Cases, 94 U. S., 113.

Fourth Point.—The acts in question derive no aid from the supposed police power of the State to protect itself by proper legislation against actual paupers, criminals, vagrants and other objectionable persons seeking to enter its territory.

Assuming that such a power exists in the State, and

without entering into any inquiry as to its extent, and the means by which it can be made available, the acts in question are not, and do not purport to be, the exercise of such a power.

A greater perversion of the "police power" can hardly be imagined than to direct it against the great body of intelligent, law-abiding, industrious and honest people who seek our shores from the best motives which can actuate mankind, by way of a direct tax to pay for the support, care, custody and transportation of such of their fellow-passengers as may happen to be undesirable members of society.

See Henderson v. *The Mayor*, 92 U. S., *p.* 269.

Fifth Point.—Even if the acts in question could be, in any just sense, regarded as an exercise of the "police power," they are still regulations of commerce of a character which belong to the exclusive control of Congress.

The tax is imposed under the guise of a duty actually necessary for executing an inspection law. It is levied for each alien passenger who comes by vessel from a foreign port, and is thus an exercise of power in reference to such person, and to the owners of the vessels in which he comes, wholly irrespective of any state of facts or of any ground or reason upon which the police power of the State can be exerted.

The principle upon which State legislation has been upheld under the so called "police-power," is the right to adopt precautionary measures against social evils—a right founded on the law of self-defense (*Railroad Co.* v. *Husen*, 95 U. S., 465, p. 471), and in the *Henderson Case*, 92 U. S., p. 275, this court carefully limits its query whether legislation may be resorted to by the States to protect themselves

against objectionable passengers, to the case of "*actual*" (italicised in the opinion) paupers, vagrants, criminals and diseased persons.

But the acts in question impose the tax on all passengers as such, without distinction, and the liability attaches to each passenger as soon as he comes on board the vessel at the foreign port, and without reference to the question whether, on arriving at the port of New York and becoming a member of the community there he will contribute to its well-being or to its injury.

The test as to the subjects which fall within the exclusive power of Congress to regulate commerce, stated in *Brown* vs. *The State of Maryland*, 12 Wheat., 419, and adhered to by this court, as expressed in *Cooley* vs. *The Wardens*, 12 How., 299, applies here:

"Whatever subjects of this power are in their nature "national or admit of one uniform system or plan of reg- "ulation, may justly be said to be of such a nature as to "require exclusive legislation by Congress."

And see Mobile v. *Kimball*, 102 U. S., 691.
Tiernan v. *Rinker*, 102 U. S., 123.

In fact, Congress has passed an act which prescribes a uniform system.

Appendix, post p. 17.

Certainly, the regulation of the terms on which shipowners shall bring passengers from foreign ports to our own ports is by essential a regulation of commerce, as referring to the transportation of persons by means of navigation, and so this court has repeatedly held.

Crandall vs. *Nevada*, 6 Wall., 35.
Railroad Co. vs. *Fuller*, 17 *Id.*, 560.
Railroad Co. vs. *Maryland*, 21 *Id.*, 456.

No valid support can be found for the suggestion that a difference in regulation is required or should be made in reference to one port in contradistinction from another.

Sixth Point—The attempted exercise of the power to tax passengers cannot be upheld on the ground that they are "imports," and therefore within the exception permitted by the Constitution.

Unless "absolutely necessary" for the execution of inspection laws, the State can lay no duty or impost on imports or exports.

Passengers are not "imports" or "exports."

The *dicta* in the opinions referred to by the learned counsel for the plaintiffs in error, and the terms used in the statutes cited by them, do not sustain the claim that the persons in respect to whom the *per capita* tax is levied by the Act of May 31, 1881, come within the meaning of the word "imports." Persons not held to service or labor, and not coming to the country under any compulsion or engagement for labor, but free as to their movements, and otherwise self-directed, have never been classed as "imports," and cannot be so classed by any just application of language, or of the rules of construction.

Seventh Point.—Without pursuing the discussion upon other points, covered by the brief of the learned counsel for the defendant in error, we submit, on behalf of the steamship companies interested with the defendant in error in resisting this new attempt to exact a tax upon passengers, that the tax cannot be upheld in any possible view of the subject.

The effort is kindred to that by which the State of New York has endeavored to avoid the clause in the same section of the Constitution which forbids the enactment by the States of tonnage duty by the passage of a statute which has been condemned by this court as unconstitutional and void.

Inman Steamship Co. v. *Tinker*, 94 *U. S.*, 238.

The Commissioners of Emigration of New York, like the Harbor Masters, are officers of State appointment, and

their functions relate to the administration of affairs pertaining to the State government. The funds required for their compensation and for the maintenance of the systems which they administer, should properly be furnished by the State in the exercise of its general taxing powers. All former efforts to fasten these expenses upon the commerce of the port by tonnage laws and by regulations of commerce in the form of a passenger tax, have failed.

The plain provisions of the Constitution of the United States have proved insuperable obstacles in their way. It is plain that the last resort of the State Legislature to the pretext of an absolute necessity for execution of an inspection law to justify the levying of the same tax, varied slightly in amount, which this court held in the Henderson case could not be levied by any State, cannot be sanctioned unless the State is to be permitted to do by indirection what it could not do directly.

What we claim is:

I.—The levying a tax on passengers, under whatever guise attempted, is a regulation of commerce, exclusively within the power of Congress.

II.—State "inspection laws," as intended by the Constitution of the United States, Art. I., sec. 10, relate solely to merchandise and commodities and not to persons; if they refer at all to "imports" it is only to *goods* and not to *passengers*.

III.—Inspection laws were abolished in New York by the State Constitution which went into effect January 1, 1847, and, at the time of the passage of the Act of May 31, 1881, "to *raise money for the execution of the "inspection laws of the State of New York*," there were no such laws.

IV.—The Act of May 28, 1881, "*for the inspection of alien "emigrants and their effects by the Commissioners of "Emigration*," is not an "inspection law." It cannot be made such by designating it as an "inspection

law " in another statute. It refers to and deals with persons, and not with goods.

V.—The Act of May 31, 1881, cannot be upheld as an exercise of the police power of the State. The State cannot, under the pretext of exercising its police power in reference to the exclusion of objectionable persons, impose a tax on all alien passengers arriving at its ports. It is a direct interference with the exclusive powers of Congress to regulate commerce.

VI.—The acts in question on their face embrace subjects which do not come within the scope of "inspection laws," or of the police power. They relate to a system which includes the care, custody, detention, maintenance and transportation of the persons to whom they refer, all to be supported by the attempted tax on passengers. This is manifest from the terms of the acts taken together.

VII.—The legislation of New York in the two acts under consideration is shown to be an attempt to avoid the effect of the former decisions of this court, and to exercise by indirection a power the Constitution expressly forbids the States to exercise directly.

Eighth Point.—The judgment of the Circuit Court should be affirmed.

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Of Counsel for the Steamship Companies above named.

APPENDIX.

See ante, p. 13.

AN ACT TO REGULATE IMMIGRATION; APPROVED AUGUST 3, 1882.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there shall be levied, collected and paid a duty of fifty cents for each and every passenger not a citizen of the United States who shall come by steam or sail vessel from a foreign port to any port within the United States. The said duty shall be paid to the collector of customs of the port to which such passenger shall come, or if there be no collector at such port, then to the collector of customs nearest thereto, by the master, owner, agent or consignee of every such vessel, within twenty-four hours after the entry thereof into such port. The money thus collected shall be paid into the United States Treasury, and shall constitute a fund to be called the immigrant fund, and shall be used, under the direction of the Secretary of the Treasury, to defray the expenses of regulating immigration under this act, and for the care of immigrants arriving in the United States, for the relief of such as are in distress, and for the general purposes and expenses of carrying this act into effect. The duty imposed by this section shall be a lien upon the vessels which shall bring such passengers into the United States, and shall be a debt in favor of the United States against the owner or owners of such vessels; and the payment of such duty may be enforced by any legal or equitable remedy: *Provided,* That no greater sum shall be expended for the purposes hereinbefore mentioned, at any port, than shall have been collected at such port.

SEC. 2. That the Secretary of the Treasury is hereby charged with the duty of executing the provisions of this act, and with supervision over the business of immigration to the United States; and for that purpose he shall have

power to enter into contracts with such State commission, board or officers as may be designated for that purpose by the Governor of any State to take charge of the local affairs of immigration in the ports within said State, and to provide for the support and relief of such immigrants therein landing as may fall into distress or need public aid, under the rules and regulations to be prescribed by said secretary. And it shall be the duty of such State commission, board or officers so designated to examine into the condition of passengers arriving at the ports within such State in any ship or vessel; and for that purpose all or any of such commissioners or officers, or such other person or persons as they shall appoint, shall be authorized to go on board of and through any such ship or vessel, and if on such examination there shall be found among such passengers any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge, they shall report the same in writing to the Collector of such port, and such persons shall not be permitted to land.

SEC. 3. That the Secretary of the Treasury shall establish such regulations and rules and issue from time to time such instructions, not inconsistent with the law, as he shall deem best calculated to protect the United States, and immigrants into the United States from fraud and loss, and for carrying out the provisions of this act and the immigration laws of the United States; and he shall prescribe all forms of bonds, entries, and other papers to be used under and in the enforcement of the various provisions of this act.

SEC. 4. That all foreign convicts, except those convicted of political offenses, upon arrival, shall be sent back to the nations to which they belong and from whence they came. The Secretary of the Treasury may designate the State Board of Charities of any State in which such board shall exist by law, or any commission in any State, or any person or persons in any State whose duty it shall be to execute the provisions of this section without compensation. The Secretary of the Treasury shall prescribe regulations for the return of the aforesaid persons to the countries from whence

they came, and shall furnish instructions to the board, commission, or persons charged with the execution of the provisions of this section as to the mode of procedure in respect thereto, and may change such instructions from time to time. The expense of such return of the aforesaid persons not permitted to land shall be borne by the owners of the vessels in which they came.

SEC. 5. That this act shall take effect immediately.

And see Treasury Circular of August 7, 1882 (No. 89), issued pursuant to above act.